DOCUMENT RESUME

ED 374 711 HE 027 717

AUTHOR	Annunziato, Frank R., Ed.; Johnson, Beth H., Ed.
TITLE	Higher Education Collective Bargaining during a Period of Change. Proceedings of the Annual Conference (22nd, New York, New York, April 18-19, 1994).
INSTITUTION	City Univ. of New York, N.Y. Bernard Baruch Coll. National Center for the Study of Collective Bargaining in Higher Education and the Professions.
REPORT NO	ISBN-0-911259-31-7; ISSN-0742-3667
PUB DATE	Apr 94
NOTE	215p.
AVAILABLE FROM	National Center for the Study of Collective Bargaining in Higher Education and the Professions, Baruch College, City University of New York, 17 Lexington Ave., Box 322, New York, NY 10010 ($40).
PUB TYPE	Books (010) -- Collected Works - Conference Proceedings (021)
EDRS PRICE	MF01/PC09 Plus Postage.
DESCRIPTORS	Academic Freedom; Budgets; Case Studies; *Collective Bargaining; College Administration; College Faculty; Colleges; Community Colleges; *Court Litigation; Educational Trends; Foreign Countries; *Higher Education; Institutional Characteristics; *Labor Legislation; Leadership Responsibility; Partnerships in Education; *Public Relations; *Total Quality Management; Unions; Universities
IDENTIFIERS	Canada; Health Care Economics; Political Correctness; United States

ABSTRACT

This collection of 25 papers addresses current issues related to collective bargaining in higher education. The papers include: (1) "Higher Education Today" (Keith Geiger); (2) "Political Correctness, Academic Freedom, and Academic Unionism: Introductory Comments" (Matthew Goldstein); (3) "Academic Freedom and Campus Controversies: Separating Repressive Strategies from Unpopular Ideas" (Linda Ray Pratt); (4) "The Impact of Clinton's Health Care Proposal on Higher Education" (VirginiaAnn Shadwick); (5) "Health Care Workers and Health Care Reform" (Dennis Rivera); (6) "The Fiscal and Political Stresses Plaguing Higher Education Today" (Sean Fanelli); (7) "Partnerships in Uncertain Times: The California State University and the California Faculty Association" (VirginiaAnne Shadwick); (8) "The Situation of Higher Education in Quebec: Some Thoughts on the Challenges Facing the Academic Union Movement" (Roch Denis); (9) "Recent Trends in Collective Bargaining in Canada" (Donald Savage); (10) "Patterns of Professional Evaluation and Assigned Duties in Faculty Collective Bargaining Agreements" (Ernst Benjamin); (11) "Faculty Roles and Rewards in the Context of Accountability" (Lawrence Gold); (12) "Collective Bargaining and Technology" (Christine Maitland); (13) "Lesbian and Gay Campus Organizing for Domestic Partner Benefits" (Lee Badgett); (14) "Making It Work: Scholarship, Employment, and Power in the Academy" (Michele Janette and Tamara Joseph); (15) "Workers/Teachers/Students: Graduate Student Employee Collective Bargaining at the University of Michigan" (Jon Curtiss); (16) "The Need for Law Reform" (Julius Getman); (17) "Some Key Differences Between U.S. and Canada Labor Law" (Kevin Banks); (18) "The Best We Can Be" (Daniel Seymour); (19) "Implementing Total Quality Management at a Community College: The Adventure and the Lessons Learned" (Susanna B. Staas); (20) "Public Relations and University Budgets: A Union Perspective" (Arnold Cantor); (21) "Public Relations and University Budgets: A CUNY Case Study" (Jay Hershehshon); (22) "Public Relations and University Budgets: The University of Connecticut Experience" (Edward Marth); (23) "Discussion of Supreme Court Decision in 'Harris v. Forklift Systems'" (Gwendolyn Young Reams); (24) "Campus Bargaining and the Law: The Management Perspective" (Nicholas DiGiovannia, Jr. and Susan Lipsitz); and (25) "Campus Bargaining and the Law: The AAUP's Perspective" (Ann H. Franke). (MDM)

ED 374 711

HIGHER EDUCATION
COLLECTIVE BARGAINING
DURING A PERIOD OF CHANGE

Proceedings

Twenty-Second Annual Conference

April 1994

HE027717

FRANK R. ANNUNZIATO, Director

BETH H. JOHNSON, Conference Organizer

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY
NCSCBHEP, Baruch
College, CUNY
TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)
☒ This document has been reproduced as received from the person or organization originating it.
☐ Minor changes have been made to improve reproduction quality.
● Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

National Center for the Study of Collective
Bargaining in Higher Education and the Professions
Baruch College, City University of New York

BEST COPY AVAILABLE

HIGHER EDUCATION
COLLECTIVE BARGAINING
DURING A PERIOD OF CHANGE

Proceedings
Twenty-Second Annual Conference
April 1994

FRANK R. ANNUNZIATO, Director
BETH H. JOHNSON, Conference Organizer

National Center for the Study of Collective
Bargaining in Higher Education and the Professions
Baruch College, City University of New York

Copyright © 1994 in U. S. A.
By the National Center for the Study of Collective
Bargaining in Higher Education and the Professions
Baruch College, City University of New York

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior permission of the publisher.

Price: $40.00

ISSN 0742-3667
ISBN 0-911259-31-7

TABLE OF CONTENTS

INTRODUCTION i
Frank R. Annunziato

I. KEYNOTE ADDRESS

A. HIGHER EDUCATION TODAY 3
Keith Geiger

II. LUNCHEON SPEAKERS

A. POLITICAL CORRECTNESS, ACADEMIC FREEDOM, AND ACADEMIC UNIONISM: INTRODUCTORY COMMENTS 11
Matthew Goldstein

B. ACADEMIC FREEDOM AND CAMPUS CONTROVERSIES: SEPARATING REPRESSIVE STRATEGIES FROM UNPOPULAR IDEAS 13
Linda Ray Pratt

C. THE IMPACT OF CLINTON'S HEALTH CARE PROPOSAL ON HIGHER EDUCATION 19
VirginiaAnn Shadwick

D. HEALTH CARE WORKERS AND HEALTH CARE REFORM 23
Dennis Rivera

III. LEADERSHIP IN HARD TIMES

A. THE FISCAL AND POLITICAL STRESSES PLAGUING HIGHER EDUCATION TODAY 33
Sean Fanelli

B. PARTNERSHIPS IN UNCERTAIN TIMES: THE CALIFORNIA STATE UNIVERSITY AND THE CALIFORNIA FACULTY ASSOCIATION 39
VirginiaAnn Shadwick

C. THE SITUATION OF HIGHER EDUCATION IN QUEBEC: SOME THOUGHTS ON THE CHALLENGES FACING THE ACADEMIC UNION MOVEMENT 43
Roch Denis

D. RECENT TRENDS IN COLLECTIVE BARGAINING IN CANADA 51
Donald Savage

IV. ROLES, REWARDS, AND RESPONSIBILITIES

A. PATTERNS OF PROFESSIONAL EVALUATION AND ASSIGNED DUTIES IN FACULTY COLLECTIVE BARGAINING AGREEMENTS 63
Ernst Benjamin

B. FACULTY ROLES AND REWARDS IN THE CONTEXT OF ACCOUNTABILITY 72
Lawrence Gold

C. COLLECTIVE BARGAINING AND TECHNOLOGY 77
Christine Maitland

D. LESBIAN AND GAY CAMPUS ORGANIZING FOR DOMESTIC PARTNER BENEFITS 85
Lee Badgett

E. MAKING IT WORK: SCHOLARSHIP, EMPLOYMENT AND POWER IN THE ACADEMY 100
Michele Janette and Tamara Joseph

F. WORKERS/TEACHERS/STUDENTS: GRADUATE STUDENT EMOLOYEE COLLECTIVE BARGAINING AT THE UNIVERSITY OF MICHIGAN 108
Jon Curtiss

V. LABOR LAW REFORM

A. THE NEED FOR LAW REFORM 121
Julius (Jack) Getman

B. SOME KEY DIFFERENCES BETWEEN U.S. AND CANADA LABOR LAW 127
Kevin Banks

VI. TOTAL QUALITY MANAGEMENT

A. THE BEST WE CAN BE 139
Daniel Seymour

B. IMPLEMENTING TOTAL QUALITY MANAGEMENT AT A COMMUNITY COLLEGE: THE ADVENTURE AND THE LESSONS LEARNED 146
Susanna B. Staas

VII. PUBLIC RELATIONS

A. PUBLIC RELATIONS AND UNIVERSITY BUDGETS: A UNION PERSPECTIVE 159
Arnold Cantor

B. PUBLIC RELATIONS AND UNIVERSITY BUDGETS: A CUNY CASE STUDY 162
Jay Hershenshon

C. PUBLIC RELATIONS AND UNIVERSITY BUDGETS: THE UNIVERSITY OF CONNECTICUT EXPERIENCE 167
Edward Marth

VIII. RECENT COURT DECISIONS

A. DISCUSSION OF SUPREME COURT DECISION IN *HARRIS V. FORKLIFT SYSTEMS* 177
Gwendolyn Young Reams

B. CAMPUS BARGAINING AND THE LAW: THE MANAGEMENT PERSPECTIVE 184
Nicholas DiGiovanni, Jr. and Susan Lipsitz

C. CAMPUS BARGAINING AND THE LAW: THE AAUP'S PERSPECTIVE 200
Ann H. Franke

INTRODUCTION

The staggering number of monumental world and national events of the past five years, and their sometimes contradictory effects upon higher education, led us at the National Center to select the theme of "Higher Education Collective Bargaining During a Period of Change" for our 1994 conference. Colleges and universities have not escaped from the impact of these changes; indeed, administrators and faculty unionists have had to devote much of their energies in managing issues and problems unheard of just a few short years ago. Consider the following events:

1. The end of the Cold War, resulting from the collapse of Communist Party hegemony in the former USSR, Eastern Europe, and Germany.

2. The massive cutbacks in defense and research monies at the federal level in the United States, partially in response to the end of the Cold War, and partially in response to the nagging and persistent economic and fiscal crises which have plagued the nation throughout the 1990s.

3. The major restructuring of United States industry which has created at the same time large increases in productivity and a significant diminution of wages.

4. The proliferation of identity-based politics in the United States, especially on college and university campuses.

5. The victory of the Clinton-Gore ticket in 1992, bringing the Democratic Party to the White House for the first time in more than a decade.

6. Severe fiscal crisis in many states which has caused massive cutbacks in support for public higher education institutions.

7. The continuous decline of the labor movement in the private sector, along-side the growth of trade unionism in the public sector. Unions continue to expand in higher education, but limited to faculty and staff members in public sector institutions.

8. The push for closer international economic cooperation among nations around the world, as evident from the passage of NAFTA in North American, the strength of the European Economic Community (EEC), and the rise of Japan and China as major economic powers in the Pacific.

9. Two consecutive victories of Canada's Toronto Blue Jays in baseball's World Series, the national pastime of the United States.

We tried to construct a conference agenda which touched on the effects of these events upon higher education and higher education collective bargaining. The papers which we present in these Proceedings represent some of the finest thinking in the United States and Canada about these pressing issues.

KEYNOTE AND LUNCHEON SPEAKERS

Keith Geiger, president of the National Education Association (NEA), delivered our keynote address and set the tone for the conference. Referring to our central theme, "Higher Education Collective Bargaining During a Period of Change," President Geiger begins his paper by stressing the urgency for higher education advocates to come to terms with the **changes** confronting the academy at this time. He points out that the nation which has produced the most extensive higher education system in the world is now at a crossroads. The United States can continue to deliver the finest education to the greatest number of people, as we have done in the past, or we could deny access to millions of people from the gates of the academy, based almost exclusively on their families' income levels. President Geiger also offers specific and concrete proposals for improving the quality of higher education and the status of the professorate.

Dr. Matthew Goldstein, president of Baruch College, presided over the first day's luncheon, the topic of which was, "Political Correctness, Academic Freedom, and Academic Unionism." In his remarks printed in this volume, President Goldstein comments upon the recent and highly publicized attacks upon academic freedom at several higher education institutions. He also introduces, and provides biographical information on our luncheon speaker, **Professor Linda Ray Pratt**, president of the American Association of University Professors (AAUP).

Dr. Pratt spoke on the current "PC" controversy raging on many of the nation's campuses. Dr. Pratt points out how the term "PC" has been used to attack both negative and positive features of the 1990s academy. Through the use of real examples, Dr. Pratt urges us to condemn "PC" when it means, "a punitive or intimidating action against someone because of their views." This kind of "PC" stifles and threatens academic freedom and First Amendment rights. However, Dr. Pratt warns us that the term "PC" has also been used by enemies of academic freedom and the First Amendment to attack legitimate goals and programs at higher education institutions, like affirmative action, multi-culturalism, and the pursuit of controversial subjects of inquiry. Dr. Pratt reminds us that to pursue knowledge, speech and thought, even when out of the mainstream, must be protected. At the same time, however, we must create a more hospitable environment for groups and individuals struggling for the first time to find a home at the academy.

The theme of the second day's luncheon, National Health Care, is the most important domestic issue currently advocated by President Clinton, and debated in the United States Congress. **VirginiaAnn G. Shadwick**, president of the NEA's Higher Education Council, helps us understand what is at stake, specifically for higher education, in this debate. Ms. Shadwick points out that while colleges and universities in general provide excellent health care coverage for faculty and support personnel, spiraling premium increases over the past few years have forced administrators and union leaders to spend extensive amounts of time and money in collective bargaining to find ways to control these escalating health care costs. Yet, Ms. Shadwick ominously tells us, there will be a price tag for higher education with many of the proposed health care reforms presently pending in Congress. She urges all higher education advocates to monitor the activities in Congress and the White House so that health care reform will be passed, with positive implications for the nation's colleges and universities.

Dennis Rivera, president of the National Health and Human Human Service Employees Union, was unexpectedly called to Washington, D.C. to meet with Hillary Rodham Clinton on the question of National Health Insurance. His remarks were delivered by his Executive Assistant, Kay Anderson. President Rivera intervenes in the current health care debate, but from the point of view of the 10 million health care employees. While he generally supports the Clinton plan for restructuring our health care insurance system, President Rivera cautions us not to forget that any changes in the delivery of health care insurance will have profound consequences upon health care institutions and their employees. He also discusses the numerous and profound changes already evolving in the delivery of health care services, even without the passage of any kind of National Health Insurance plan.

LEADERSHIP IN HARD TIMES

We wanted to hear from academic leaders, both administrators and union leaders, how changes were affecting their ability to provide leadership to their respective organizations.

Dr. Sean A. Fanelli, president of Nassau Community College (New York) shared with us his experiences as an academic administrator, struggling to balance his commitment to seek truth wherever it may be found, with the practical politics which he confronts daily in his relations with state and local governmental officials. The New York State budgetary process provides the background for this paper. The State of New York has developed a convoluted budgetary process for its community colleges which has increasingly shifted the costs of education to community college students. The declining financial support from the State of New York and from local government has left little to no room for community college administrators to maneuver, since non-programmatic costs are fixed and student demand for community college educational services continues to increase yearly. The contradiction of an academic's search for truth and the stark realities of practical and sometimes raw New York politics has led Dr. Finelli to compare the fate of the community college budgetary process to the fictitious and satirical world of Lewis Carroll.

Patrick Nichelson, president of the California Faculty Association (CFA), was scheduled to be our next speaker. Unfortunately, a family emergency prevented President Nichelson from attending. **VirginiaAnn G. Shadwick**, a CFA leader from San Francisco State University and president of the NEA's Higher Education Council, generously agreed to substitute for Mr. Nicholson. Ms. Shadwick discusses some of the recent effects of California's economic collapse upon the relatively young and somewhat contentious collective bargaining relationship between the CFA and the administration of the California State University System (CSU). Despite the severe economic attacks on the 21 colleges of the CSU system, however, cooperative efforts between labor and management have begun. Ms. Shadwick analyzes several of these joint labor/management projects at CSU and assesses the risks and benefits for both parties.

Two leaders of faculty unions in Canada then provide us with their analysis of the impact of change upon Canadian institutions. **Roch Denis**, president of Canada's French-speaking Fédération Québécois des Professeures et Professeurs d'Université (FQPPU), discusses the phenomenon which he calls state divestment from higher education. For the last five years, federal and provincial governments in Canada have contributed fewer and fewer dollars to higher education. In Quebec, these cutbacks have been particularly devastating, according to Denis, because most of the colleges and universities in that French-speaking province are less than 25 years old. Professor Denis hopes that faculty unionists turn their collective bargaining efforts to solving the severe academic problems created by these "draconian" governmental measures. He also makes the case that leaders of the academic union movement must talk with each other at the international level, because they are all grappling with similar problems.

Dr. Donald Savage, executive director of the Canadian Association of University Teachers (CAUT), addresses four major trends in English-speaking Canadian higher education collective bargaining which have surfaced over the past few years: financial pressures, quality assessment, the problems of fraud and misconduct in research, and confidentiality as a barrier to grievance and arbitration procedures. He analyzes the sometimes diverse responses of Canadian university administrators and faculty union leaders to these trends, through case studies at various Canadian institutions. First, however, Dr. Savage offers some preliminary comments on the structural and legal differences between Canadian and U.S. higher education collective bargaining. Even more decentralized than in the United States, Canadian collective bargaining is nonetheless much more extensive, involving many more faculty members on a proportional basis.

ROLES, REWARDS, AND RESPONSIBILITIES

The fiscal pressures on higher education have led to renewed calls to reassess faculty responsibilities and rewards. The perennial questions about the comparative value of research versus teaching are asked with more frequency, especially because technology is on the brink of revolutionizing how educational services are delivered. At the same time, marginalized groups at the academy, such as gays and lesbians, demand equitable treatment in fringe benefit coverage. Graduate student employees, caught in the squeeze of declining funds, in their role as employees, but greater pressure to complete their degrees, in their role as students, increasingly turn to unionization.

Ernst Benjamin, AAUP general secretary, points out that the current debate over faculty workload has all but ignored the existence of collective bargaining agreements in higher education. To help fill in this intellectual lacuna, Dr. Benjamin surveys thirty AAUP collective bargaining agreements with respect to two contractual articles: faculty workload and faculty evaluation procedures. He notes that the language of the agreements in these two areas tends to be contradictory; teaching is emphasized in the workload provisions, but research tends to be stressed in the evaluation procedures. Dr. Benjamin concludes that the current debate over faculty workload will not produce desirable fruit, while institutions remain unresponsive to this contradictory pattern.

Dr. Lawrence Gold, director of the College and University Department of the American Federation of Teachers (AFT), locates the discussion of faculty roles and rewards within the current accountability movement sweeping the nation. Dr. Gold urges higher education advocates not to dismiss as hopelessly reactionary the numerous calls for greater accountability. To direct this movement positively, higher education advocates must develop, according to Dr. Gold, a two-prong strategy. First, they must articulate what higher education is all about to the general public. Secondly, higher education advocates must look internally, to insure that collegial processes are implemented which can correctly define institutional missions and goals. Dr. Gold urges us not to be frightened by the accountability movement, but to welcome it as an opportunity to inform the public of what we have accomplished, and what we could accomplish with greater support.

Dr. Christine Maitland, coordinator of Higher Education Services for the NEA, presents an overview of NEA negotiated contract language in the area of technology and collective bargaining. Dr. Maitland's research, which is taken from a chapter entitled "Trends in Bargaining: Restructuring and the Terms of Professional Labor" will appear in the 1995 NEA Almanac of Higher Education. For this research, the NEA's Higher Education Research Center selected a sample of approximately 200 contracts. Dr. Maitland presents and analyzes contract language in the diverse areas of the law and intellectual property rights, and faculty compensation for participation in distance learning (video, television, computer). Dr. Maitland notes that the language in many of these contracts is very tenuous, reflecting the early involvement of collective bargaining in this new technological world at the academy.

Professor Lee Badgett of the University of Maryland School of Public Affairs presents and analyzes the strategies undertaken by gay and lesbian activists on college and university campuses over the past few years to win various types of fringe benefit coverage, especially health insurance, for gay and straight "domestic partners." Dr. Badgett has conducted extensive interviews and has assembled numerous fringe benefit documents from many institutions in preparation for this presentation.

Michele Janette and **Tamara Joseph**, co-presidents of the Graduate Students Employee Organization (GESO) of Yale University, describe their union of graduate employees' struggle to achieve economic gains and union recognition from a recalcitrant administration. Since Yale is a private institution under the aegis of the National Labor Relations Board, graduate student unionization is not a protected activity. Therefore, to win concessions, GESO at Yale has formed an alliance with the two other unions at Yale, and has developed mutual strategies and tactics.

Jon Curtiss, vice-president of the University of Michigan Graduate Employees Union (GEO), analyzes the sometimes conflicting roles of the graduate employee, as student and as worker at the university level. He argues that the institution of collective bargaining has helped graduate employees, faculty, and administrators resolve the tensions which have developed from these conflicting roles. Mr. Curtiss also presents a brief history of the twenty years of graduate employee collective bargaining at the University of Michigan. Only the University of Wisconsin has engaged in collective bargaining with its graduate employees for a longer period of time (since 1969). Finally, Mr. Curtiss addresses some of the current issues in graduate employee collective bargaining, such as negotiating living wages in tough economic times, improving TA training, and fighting various forms of discrimination.

LABOR LAW REFORM

President Clinton has appointed the Commission for the Future of Worker/Management Relations, chaired by former Secretary of Labor and Harvard University industrial relations scholar, John Dunlop. We thought it would be useful to have an expert in labor law discuss some of the problems in United States labor law. We also thought it important to compare Canadian and United States labor law systems, since the Canadian unions have shown great growth over the past two decades, during the same time that the U.S. unions have experienced severe decreases.

Labor law professor, **Julius (Jack) Getman** of the University of Texas Law School, begins his presentation by posing the "most important question in U.S. labor relations...why private sector unions represent so small a proportion of the work force." Noting that collective bargaining, when successful, has made impressive positive contributions to our society, Professor Getman states that several (economic, political, social, ideological, etc.) factors are responsible for the decline in private sector unionism over the past few decades. However, in terms of this paper, he has concentrated on the difficulties created by U.S. labor law in two areas: union organizing and negotiations. Professor Getman offers modest proposals in both of these areas to change labor law, including legislative repeal of the Yeshiva decision.

Attorney **Kevin Banks**, professional officer of the Canadian Association of University Teachers (CAUT), argues that the diverse labor law regimes of the United States and Canada can help to explain the stark differences in unionization rates between the two countries. While the United States has witnessed a steady decline in union density over the past twenty-five years, the Canadian labor movement's membership is higher today than in 1970. Attorney Banks compares and contrasts five aspects of the labor law regimes of the U.S. and Canada: certification procedures, labor board remedial powers, use of striker replacements, union security, and successorship.

TOTAL QUALITY MANAGEMENT

Higher education has not escaped the hues and cries for quality improvement which have forced U.S. industry to rethink its production processes. How can quality be improved in higher education? Are there lessons to be learned from the Total Quality movement which has captivated U.S. industry over the past decade? Can we think of students as our consumers or customers? If so, what does that make faculty?

Author **Daniel Seymour** terms the current evaluation system prevalent on college and university campuses as a "recipe for mediocrity." He argues in favor of a "quality by improvement" approach to foster a new appreciation of excellence among all campus constituencies. According to Seymour, the current methods of assessing quality at the academy, which he calls "quality by threshold," ask the completely wrong question. Instead of wanting to know if our work is "good enough," we should be striving to become "the best that we can be." Faculty evaluation should be based upon systemic excellence, rather than trying to weed out poor teachers or to reward the meritorious.

Susanna B. Staas, quality coordinator, Delaware County Community College of Media, Pennsylvania, relates the eight

14

year campaign to implement Total Quality Management (TQM) at her institution. Begun initially as an administrative initiative, the TQM campaign sought to involve all elements of the college community from the outset, including representative from the faculty union. Ms. Staas draws important lessons from her experiences as Quality Coordinator for Delaware County Community College.

PUBLIC RELATIONS

Increasingly administrators and faculty union leaders have turned to public relations to help in their budgetary struggles with various governmental bodies.

Arnold Cantor, executive director of CUNY's Professional Staff Congress (PSC) AFT/AAUP, urges the nation's colleges and universities to undertake a continuous, well-planned, and professionally-developed public relations campaign to sell the best higher educational system in the world to the average American. Mr. Cantor states that colleges and universities tend to use public relations only during a crisis situation, such as to win support for greater public funding. However, for maximum effectiveness, college and university public relations must be conducted in the same way that Met-Life sells insurance and Chrysler sells Jeeps, through creative and extensive use of the all the media. Further, Mr. Cantor calls for greater cooperation among institutions to pay for such public relations campaigns.

Jay Hershenson, CUNY Vice Chancellor for University Relations, relates a case study of effective public relations during a budget crisis that occurred in 1991-1992 in New York City. The State of New York under-funded by some $23 million dollars the associate degree programs at CUNY's New York City Technical College (NYCTC) and John Jay College of Criminal Justice. The government of the City of New York refused to pick up the slack. The CUNY administrative leadership then developed a two-pronged strategy to restore the funding for these programs which recruited primarily minority and low-income students. Vice Chancellor Hershenson also offers a few general observations to establish a year-round approach to public relations for colleges and universities.

Ed Marth, executive director of the University of Connecticut Chapter of AAUP, discusses the extensive public relations campaign developed by his organization to restore funding to a financially-scrapped institution during the worst economic recession the State of Connecticut has witnessed since the Great Depression. The University of Connecticut case study is important, not just because of its successes, but also because Mr. Marth attributes much of this success to the collaborative relationship established between the AAUP, the University's administration, and its Board of Trustees.

RECENT COURT DECISIONS

The National Center tries to present at our annual conference a review of significant state and federal court decisions of interest and importance to higher education collective bargaining advocates.

Attorney **Gwendolyn Young Reams**, Associate General Counsel of the Equal Employment Opportunities Commission (EEOC) analyses the state of the law in light of the unanimous Harris v. Forklift Systems (1993) decision of the Supreme Court of the United States. In this case, the Court grappled with the question of what constitutes a hostile work environment in claims of sexual harassment arising under Title VII of the Civil Rights Act of 1964. Attorney Reams takes us step by step through the Court's reasoning and points out that such reasoning, although presented in a sexual harassment claim, is also applicable to harassment claims under Title VII with respect to race, color, religion, or national origin. Attorney Reams also presents the legal antecedent to Harris, the Supreme Court's Meritor Savings Bank v. Vinson (1986), which was the first time the Court ruled that sexual harassment constitutes sex discrimination under Title VII. She also compares how the two decisions complement each other. Finally, Attorney Reams offers two important issues that are not implicated by the Harris decision: employer liability in hostile work environment cases and employee freedom of speech rights.

Attorney **Nicholas DiGiovanni, Jr.**, a management advocate from the Boston law firm of Morgan, Brown, Joy, delineates for us the major Supreme Court of the United States and Federal and State court decisions from 1993 in the areas of employees' First Amendment rights, labor relations, discrimination complaints, disclosure of employees' addresses, agency fee procedures, contractual exhaustion requirements, standing to bring forward court cases, and management's rights.

Attorney **Ann H. Franke**, counsel for the American Association of University Professors (AAUP), reviews three areas of law which affect faculty members and university administrators: the recent U.S. Supreme Court decision in NLRB v. Health Care & Retirement Corporation of America, public disclosure of classroom materials under a State of New York Freedom of Information Law (FOIL), and two precedent-setting higher education discrimination cases.

We want to especially thank Attorney Franke for amending her original April conference paper so that an analysis of the U.S. Supreme Court's May, 23 1994 decision, NLRB v. Health Care & Retirement Corporation of America, could be published in these Proceedings.

THE PROGRAM

Set forth below is the program of the Twenty-Second Annual Conference listing the topics and speakers. Some editorial liberty was taken with respect to format in order to ensure readability and consistency. If an author was unable to submit a paper, the name appears on the program, but the remarks have been omitted. Opinions expressed are those of the authors, not necessarily their organizations or NCSCBHEP.

MONDAY MORNING, APRIL 18, 1994

WELCOME
Lois S. Cronholm, Provost
Baruch College, CUNY

COLLECTIVE BARGAINING UPDATE: 1994
Frank R. Annunziato, Director
NCSCBHEP, Baruch College

KEYNOTE - HIGHER EDUCATION TODAY

Speakers: Keith Geiger, President, NEA

Presiding: Lois S. Cronholm, Provost
Baruch College, CUNY

PLENARY SESSION "A"
ACADEMIC LEADERSHIP IN UNCERTAIN TIMES

Speakers: Sean Fanelli, President
Nassau Community College

VirginiaAnn Shadwick, President
National Council of Higher Education
NEA

Moderator: Ilona H. Anderson, Acting Dean for Faculty Relations, City College, CUNY

MONDAY AFTERNOON, APRIL 18, 1994

PLENARY SESSION "B"
PROBLEMS IN LABOR LAW REFORM

Speakers: Julius (Jack) Getman, Professor
University of Texas Law School

Joel M. Douglas, Professor
Baruch College, CUNY

Kevin Banks, Esq.
Professional Legal Officer, CAUT

Moderator: Eugene Tulchin, President
Cooper Union Federation of Teachers

LUNCHEON
POLITICAL CORRECTNESS, ACADEMIC FREEDOM, AND ACADEMIC UNIONISM

Speakers: Linda Ray Pratt, President
AAUP

Irwin Polishook, President
Professional Staff Congress, CUNY

Presiding: Matthew Goldstein, President
Barugh College, CUNY

CONCURRENT SESSION "C"
FACULTY ROLES AND REWARDS

Speakers: Ernst Benjamin, General Secretary
AAUP

Eugene Rice, Vice President and Dean
of Faculty, Antioch College

Lawrence Gold, Director of College
and University Department, AFT

Moderator: Caesar Naples, Vice Chancellor Emeritus/
Trustee Professor, California State Univ.

CONCURRENT SESSION "C"
HIGHER EDUCATION COLLECTIVE BARGAINING IN CANADA

Speakers: Donald Savage, Executive Director
CAUT

Roch Denis, President, Quebec
Federation of University Professors

Moderator: Cynthia Adams, Associate Dean
Allied Health, Univ. of Connecticut

PLENARY SESSION "D"
SEXUAL HARASSMENT AND DUE PROCESS RIGHTS

Speakers: Gwendolyn Young Reams, Esq.
Associate General Counsel EEOC

Ruby Lockhart, Labor Specialist
NYSUT

Moderator: Esther Liebert, Dean of Faculty
and Staff Relations, Baruch College

TUESDAY MORNING, APRIL 19, 1994

PLENARY SESSION "E"
CAMPUS BARGAINING AND THE LAW

Speakers:
Nicholas DiGiovanni, Jr., Esq.
Morgan, Brown, & Joy, Boston, MA

Ann H. Franke, Esq.
Asst. Secretary & Counsel, AAUP

Christine Maitland, Coordinator of
Higher Education Services, NEA

Moderator:
Thomas Mannix, Associate Vice Chancellor
Faculty Employee Relations, SUNY

CONCURRENT SESSION "F"
PUBLIC RELATIONS AND UNIVERSITY BUDGETS

Speakers:
Jay Hershenson, Vice Chancellor for
University Relations, CUNY

Arnold Cantor, Executive Director
Professional Staff Congress, CUNY

Edward Marth, Executive Director
University of CT Chapter, AAUP

Jonathan Pelto, Esq.
Communications Strategist
Robinson & Cole, Hartford, CT

Moderator:
Priscilla Lyons, Director of Higher Ed.
Massachusetts Teachers Association

CONCURRENT "F"
GRADUATE EMPLOYEE COLLECTIVE BARGAINING

Speakers:
Jon Curtiss, Vice President
GEO, University of Michigan

Nancy DeProsse, GEO
University of Massachusetts

Michelle Janette, Team Leader &
Tamara Joseph, Chair, GESO, Yale

Moderator:
Richard Hurd, Director of Labor
Studies, Cornell University

TUESDAY AFTERNOON, APRIL 19, 1994

CONCURRENT SESSION "G"
TOTAL QUALITY MANAGEMENT IN HIGHER EDUCATION

Speakers: Daniel Seymour, author of *On Q: Causing Quality in Higher Ed.*

Gregory Lozier, Exec. Dir, Office of Pln. & Analysis, Penn. State U.

Susanna Staas, Quality Coordinator
Delaware County Community College

Moderator: John McGarraghy, Professor
Education, Baruch College, CUNY

CONCURRENT SESSION "G"
GAY PRESENCE ON CAMPUS

Speakers: Lee Badgett, Professor, School of Public Affairs, Univ. of Maryland

Denise Reinhardt, Esq.
Reinhardt & Schachter, Newark, NJ

Moderator: James Hoover, Professor of Law
Columbia University

LUNCHEON
NATIONAL HEALTH INSURANCE

Speakers: Dennis Rivera, President, 1199, Nat. Health & Human Serv. Empls. Union

VirginiaAnn Shadwick, President
National Council of Higher Ed., NEA

Moderator: Frederick S. Lane, Professor
Baruch College, CUNY

SUMMATION AND ADJOURNMENT

A WORD ABOUT THE NATIONAL CENTER

The National Center is an impartial, nonprofit educational institution serving as a clearinghouse and forum for those engaged in collective bargaining (and the related processes of grievance administration and arbitration) in colleges and universities. Operating on the campus of Baruch College, The City University of New York, it addresses its research to scholars and practitioners in the field. Membership consists of institutions and individuals from all regions of the U.S. and Canada. Activities are financed primarily by membership, conference and workshop fees, foundation grants, and income from various services and publications made available to members and the public.

Among the activities are:

- An annual Spring Conference
- Publication, of the Proceedings of the Annual Conference, containing texts of all major papers.
- Issuance of an annual Directory of Faculty Contracts and Bargaining Agents in Institutions of Higher Education.
- An annual Bibliography, Collective Bargaining in Higher Education and the Professions.
- The National Center Newsletter, issued four times a year providing in-depth analysis of trends, current developments, major decisions of courts and regulatory bodies, updates of contract negotiations and selection of bargaining agents, reviews and listings of publications in the field.
- Monographs -- complete coverage of a major problem or area, sometimes of book length.
- Elias Lieberman Higher Education Contract Library maintained by the National Center containing more than 350 college and university collective bargaining agreements, important books and relevant research reports.

ACKNOWLEDGMENTS

Members of The National Center's National Advisory Board and our Baruch College Faculty Advisory Board provided us with terrific ideas for speakers and topics for the conference. We are grateful to all our speakers, and to the moderators who chaired each of the sessions. Beth Hillman Johnson, the National Center's Administrative Director, devoted countless hours to ensure a successful event. We must also thank the National Center's staff, College Assistants Karen Daniel and Israel Alvarez, and Graduate Assistant, Johnny Lee for all their hard work.

Frank R. Annunziato
Director

I. KEYNOTE ADDRESS

Higher Education Today

HIGHER EDUCATION TODAY

Keith Geiger, President
National Education Association

It is an honor and a privilege for me to participate in this conference because there is nothing more immediate . . . more compelling . . . more important . . . than the changes we now face in education and in collective bargaining. During the last five years, we in the National Education Association have been working to redefine our organization to meet the challenges of those changes.

Today, America stands at a crossroads and seems not to know which road to take. The emergence of a global economy -- an economy in which U.S. pre-eminence is by no means guaranteed -- leaves our nation facing new and discomforting realities. Economic adversity creates national anxiety. We are not as confident as we once were. We are not as arrogant as we once were. We seem adrift, unsure. We are searching for a strategy to facilitate our conversion from a defense economy to a domestic economy. Economic experts have shown that to become a permanent winner in world economic competition, there is only one strategy America can adopt: we must invest in education and training.

American's economy is dependent as never before on an educated work-force. The world, and its changing economy, has passed beyond the days when people were pressed to act like mindless cogs in a larger machine called a mass production assembly line. Those days are gone forever. Other nations have discovered, and have acted on the discovery, that learning is the labor of the future. These nations support that labor. That is the strategy of those nations experiencing the greatest success in the global economy. Now, it is time for America to act on the knowledge that the linchpin to long-term economic growth is education. Consider:

- For every dollar spent on education, four dollars are returned in taxes.
- Industries now prefer people with at least two years of college.
- The gap in pay between a thirty-year-old male high school graduate and a thirty-year-old male college graduate has increased from fifteen percent in 1973 to fifty percent in 1989.

The economic strategy of working to produce the world's best educated citizenry is possible for one reason, and one reason alone: America has the finest system of higher education in the world. We have the most students -- over 13 million -- and the greatest number of institutions -- over 3,400 colleges and universities. The daily lives of more than one-quarter of the American people are involved in formal education -- as students, teachers, and support personnel. Fritz Machlup estimates that the production and distribution of knowledge -- in all its many forms -- accounts for 25 percent of the national income, and it is growing at twice the rate of the economy as a whole.

A report released last year by the National Commission on Responsibilities for Financing Postsecondary Education declared that, "American Higher Education has ranked as the unchallenged leader in the world for much of the 20th Century. In basic research and scientific achievement, American postsecondary institutions generally are regarded as the most effective in advancing the social and economic conditions of individuals."

American Higher Education remains the envy of the world. More students from other countries seek admittance to our colleges and universities than to those of any other nation. Clark Kerr, one of the pre-eminent leaders in higher education, once noted: "Few nations in history have relied so fully and for so long on education for solutions to so many problems as has the United States."

But too many of our state and national leaders seem to want to turn their backs on this American tradition of reliance on education. Too many seem to want to gain a stall in the world marketplace by relying on lowering our wages and by forcing our standard of living way down. As a result, the average American worker makes nine percent less in real wages today than in 1973. For the majority of Americans, the deterioration of our standard of living is not a distant threat, but a present reality. This strategy cannot work in the long run. The economy of the future will be based on information, and the information age will punish ignorance.

Nevertheless, there is a growing lack of support for higher education in America. The fiscal crisis in the states has hit higher education harder than most other sectors of the economy. For three years in a row, ending in 1993, higher education suffered severe cutbacks in state appropriations. The annual report from the Center for Higher Education at Illinois State University concluded that this year, in 1994, public higher education was "crawling toward recovery" with a two percent increase in appropriations over a two-year period. That study concluded that 36 states gave more money for higher education in 1993-94 than in the previous two years. However, when the figures are adjusted for inflation, colleges and universities in 29 states have less buying power than two years ago...those in four states had no increase at all...and the increases in the remaining three states were infinitesimal.

Across the nation, thousands of temporary faculty have lost their jobs as a result of cutbacks in funding. As tenured faculty retire, they are not being replaced. We are seeing some layoffs of tenure-track faculty.

Meanwhile, higher education has come under unprecedented attack. A recent Wingspread Report concluded, "The simple fact is that some faculties and institutions certify for graduation too many students who cannot read and write very well, too many whose intellectual depth and breadth are unimpressive, and too many whose skills are inadequate in the face of the demands of contemporary life." All of this is happening during a period of increased demand for higher education. That is almost unheard of, and it is an ominous sign. The long-term impact of the decline in support for higher education is an erosion of our quality of life. The loss of thousands of faculty positions represents a drain of our single most important national resource: brain power. At the same time, outdated equipment, poor maintenance, and cutbacks in library acquisitions, all inhibit our ability to help students gain the knowledge they must have to keep this nation proud, free, and strong.

Across the country, the biggest loser in higher education has been California, where appropriations dropped 25 percent. The California State University system, one of three systems in the state, was forced to offer early retirement, to raise its tuition, and to cut course offerings. The results? Enrollment has declined, classes are bigger, and students are taking longer to graduate.

The National Commission I mentioned earlier reports that "There is growing anxiety that the American system of higher education may lose its place of prominence." This concern is echoed by Senator James Jeffords, Republican of Vermont, who authored the legislation that created the Commission. To quote from senator Jeffords:

> Without affordable postsecondary education, without national support for meaningful access for able students to take advantage of higher education opportunities, we will not be able to accomplish any of the objectives that we strive for as a nation and a leader of nations.

Higher education in the United states faces a time of unprecedented problems, and unparalleled opportunities.

On the one hand, support for higher education is plummeting and tuitions are spiraling. On the other hand, there is an explosion of new information and new technology that could, if utilized, revolutionize the curriculum, change the ways students are taught, and dramatically impact the notions of faculty workload and accountability.

Let's analyze our situation.

Around the country, the result of funding cutbacks in higher education is that public university tuitions are spiraling upward -- and spiraling fast: 10 percent in 1993, bringing the two-year increase in tuition rates to 22 percent.

And what about access? Tuition increases combined with the recession are having a negative impact. Thousands of students who have the desire and ability to go to college cannot do so. Those who are rejected are disproportionately from lower socioeconomic levels. But universal access to education is essential to the workings of a democracy.

Higher tuitions exacerbate the problem of minority enrollment. Blacks and Hispanics attend college at significantly lower rates than whites. We as a nation cannot afford this. By the year 2000, women, immigrants, and minorities will make up 85 percent of new workers. Those on whom our future will depend are suffering the greatest harm because of the economic assault on our entire educational system.

And even middle income families are hard-pressed to meet college costs. Between 1980 and 1988 the cost of four-year public higher education rose nearly 34 percent, while the median family income increased only 6.7 percent. Families are being forced to mortgage their homes two, three, or more times over to find money to pay tuition for their children, if they are lucky enough to own a home. Many are forced to tap into their retirement funds, if they have retirement funds.

The impact of the tuition increases could be reduced by scholarships and loan programs. But these programs have not kept pace with tuition or inflation.

What is it that we are losing? We are losing individual dreams and hopes. We are also losing contributions to our economy, our culture, and our democracy.

On the positive side, we are now experiencing a speed-up of the use of technology in higher education. Distance learning and interactive video are revolutionizing teaching and education. Computer networks are giving faculties and students access to libraries and to other faculties and students around the world.

In fact, we now face the challenge of ensuring that technological advances enhance rather than inhibit the cause of quality education. We must take the lead in ensuring that the new technology is used to improve and extend education, not to replace educators or substitute training for education.

We must also take the lead in working with state and federal agencies that have increased their scrutiny of higher education in light of the fiscal crisis. At the federal level, the Department of Education has called for new models of assessment that include reporting degree completion rates and a national assessment system to measure student learning on a national basis. The accreditation agencies will be given new authority to monitor institutions that receive federal student aid money.

There is going to be increased accountability in the academy, and as the collective bargaining representatives of higher education employees, we need to be involved in the setting of the standards.

There is currently a debate within higher education about how faculty are going to be compensated. Publish or perish is still the rule on too many campuses. Faculty members get tenure and promotion based on their research and publications. But there is a growing chorus of critics who insist that faculty members neglect their teaching responsibilities and that undergraduate education is being left to graduate assistants and temporary faculty. Now, we in education know for a fact that most faculty members spend most of their time teaching. We also know that the more you teach, the less you are paid. There is great pressure to change the current reward system and the unions need to be a part of that process.

For example, we must continually point out that salary increases in public institutions have not kept up with inflation. Faculty are experiencing significant losses in their purchasing power, and the incomes of senior faculty are eroding at a time when salary for the final years determines the level of retirement income. Faculty in Massachusetts went five years without pay raises. In California, they went three years with no hikes in salaries and then the raise was 3 percent.

Some people criticize us for bringing up the subject of salaries, but we have no need to apologize. It is not viewed as unseemly for doctors, lawyers, or business people to include in their personal goals the earning of a decent income. Why should it be unseemly for us?

We have a right to enjoy the same benefits and returns all other Americans seek and are entitled to. We have a responsibility to ensure that wages and benefits in the academy are sufficient to attract and retain the outstanding men and women who have made the American higher education system the finest in the world.

I noted earlier that at the end of this decade, women, immigrants, and minorities will constitute 85 percent of all new workers. They will also constitute the majority of all new students. They must be included in the faculties and administrations of higher education institutions in numbers proportionate to their share of the total population -- not simply because proportional representation is just and overdue, but because it is essential to the future vitality of American education.

We are also entering an era when it will be essential for current faculty to mentor new faculty. Those now entering the profession did not live through and participate in the struggles to unionize and gain professional standing and benefits. They may not know this history. They may not honor it. They certainly will not automatically be prepared to defend the benefits and rights acquired through collective bargaining.

The restructuring of higher education is happening. We must help lead the effort or it will leave us behind. We must lead with vision and with courage, with patience and with decisiveness.

We must remember that our educational responsibilities cannot be separated from social responsibilities. The fact that there are more Americans in prison today than ever before, that America has more people behind bars than any other industrialized nation, is our concern as much as it is the concern of politicians. All of us must begin to deal with the social and economic causes of this national disgrace.

We must also act on our understanding that tolerance of gender inequity is tolerance of injustice. Pay inequities have plagued higher education far too long. Equal pay for equivalent work is not a goal; it is a fundamental right. All of us must work for the creation of a society in which all women can wear buttons that read $1.00. No fraction can ever be acceptable when it comes to women's wages as compared to men's.

We must work to wipe out sexual harassment, and all other forms of harassment. It is time not merely to put an end to the abuse and the misuse of some people at the hands of others. The time is long overdue for respect and equity between and among all women and men to become the guaranteed way of life in our nation. This is a moral imperative. It is also a constitutional right. Nothing less should be acceptable.

It is time to make America all that America can and should be. And it is time to seize the opportunity to make higher education all it can and should be.

If the country and the world are changing, let us help change them for the better.

If the economy is going global, let us turn that into an opportunity to improve the lives and the visions, the rights and the options, of all.

If our students today will determine our nation's future, let us do all that needs to be done to ensure that they are ready, in their minds and in their hearts, to make the American dream the American reality.

I know this is a tall order. It will not be easy. But we are teachers and higher education employees. Difficult is what we do best.

You have proven you can create the best system of higher education in the world. Now, working together, I know you can bring that system into the 21st century. Working together, I know you can keep the American system of higher education the envy of the world.

II. LUNCHEON SPEAKERS

A. **Political Correctness, Academic Freedom, and Academic Unionism**

B. **Academic Freedom and Campus Controversies: Separating Repressive Strategies from Unpopular Ideas**

C. **The Impact of Clinton's Health Care Proposal on Higher Education**

D. **Health Care Workers and Health Care Reform**

A. POLITICAL CORRECTNESS, ACADEMIC FREEDOM, AND ACADEMIC UNIONISM

Introductory Comments of Matthew Goldstein,
President, Baruch College, CUNY

Good afternoon, I am Matthew Goldstein, President of Baruch College, the home of the National Center for the Study of Collective Bargaining in Higher Education and the Professions. By now, I am sure many of you are aware that we are fortunate to have obtained the services of Dr. Frank Annunziato, the Center's new Director. We expect further that by the end of this academic year Baruch will have established a new School of Public Affairs where the center will find a new home and a broader focus.

Our session deals with Political Correctness, Academic Freedom and Academic Unionism. Imbedded in this title are foundational issues guaranteed by the First Amendment to the Constitution -- free speech and a free press.

Justice Hugo L. Black wrote memorably about that proposition, and I quote, "First in the catalogue of human liberties essential to the life and growth of a government of, for and by the people are those liberties written into the First Amendment to our Constitution."

Of late, there have been significant efforts to restrict First Amendment values, if not legally defined First Amendment rights; and that effort is happening of all places on our colleges and university campuses. Student newspapers have been seized and destroyed on a number of university campuses, because certain groups found that articles or ads were repugnant, hateful, or downright lies. Many colleges have adopted speech codes; some have written codes prohibiting bad manners. One specifically outlawed inappropriately directed laughter. When challenged some of these codes have been judged to be unconstitutional.

Of course, we are all aware that some faculty do not feel free to have their say and to teach their courses as they see fit. Some avoid particular subject matters completely, while compromising with material they themselves question. Others are painfully aware of incidents that may have contributed to poor salary reviews, and negative promotional and tenure decisions. They know well the effects of criticism and threats (if not censure) by all constituencies on and off campus.

On the other side of the issue, however, are students who complain that words, ideas, gestures and positions of the teacher or other students in class create an environment in which the equal ability of students to learn is obstructed and, hence, a violation of their basic civil rights.

To expand upon these most serious issues of the relationship of PC to academic freedom and First Amendment values, we are fortunate today to have an experienced and nationally-recognized professional in issues of faculty governance, and a scholar in her chosen discipline.

Linda Ray Pratt is President of the American Association of University Professors, and Professor of English at the University of Nebraska-Lincoln. Before becoming President of the AAUP, Linda served as its first vice president. She was also chair of the AAUP committee which recently published an extensive report on the status of non-tenure track faculty. After receiving her Ph.D. from Emory University in 1971, Dr. Pratt went to the University of Nebraska, rising to full professor in 1977. In her academic life, Linda's area of specialization is Victorian and Early Modern Poetry. She has published extensively in poetry and in women's literature. At Nebraska, she also is active in the women's studies program, and in 1988 Linda won a Distinguished Teaching Award.

Ladies and gentlemen, I am proud and honored to turn the microphone over to this distinguished colleague, Dr. Linda Ray Pratt.

B. ACADEMIC FREEDOM AND CAMPUS CONTROVERSIES: SEPARATING REPRESSIVE STRATEGIES FROM UNPOPULAR IDEAS

Linda Ray Pratt, President
American Association of University Professors

Lynne Cheney's parting shot at the professoriate upon leaving her post at the National Endowment for the Humanities was a pamphlet called "Telling the Truth." It was about how we didn't. The intellectual life of the academy has always been under scrutiny and subject to controversy, but Cheney's attack was part of a series of assaults on the profession that impugned the ethics of the profession as well as condemned its presumed political perspective. In charging political correctness, Cheney was accusing faculty of violating the most sacred tenant of the academy: academic freedom. Not only were faculty supposedly making a travesty of academic freedom by manipulating our teaching for political ends; we were violating the academic freedom of our students by refusing them the right to disagree.

Like the authors of books such as *Illiberal Education: The Politics of Race and Sex on Campus*, *Prof Scam*, *Killing the Spirit*, or *Impostors in the Temple*, Cheney was herself pursuing a political agenda. Politicizing the classroom is not, however, a function of where one is on the political spectrum. Real political correctness comes in every ideological variety, and its practitioners can as readily be administrators and students -- or government figures -- as faculty.

But I said "real political correctness," which obviously implies that I believe there are things that are inappropriately labeled that way. Unfortunately, we have not been careful how we used this term -- it rapidly became too easy to smear any new ideas or practices one found threatening with the PC tag -- and the academy has suffered the consequences of fuzzy definitions and thoughtless if not craven responses. Yet, nothing in recent years has so undermined the public's respect for the academy as the PC controversy. PC on campus has drawn a public picture that portrays us as out of step with the community's values, willing to compromise academic freedom for political purposes, and more interested in indoctrinating than educating. That picture of the profession in turn serves the interest of those who seek to cut our budgets, break the tenure system, and increase our workloads. The PC controversy reactivated suspicions about intellectuals that had been vague and revived images of the campus as a hotbed of radical activity that had flourished during the McCarthy era and the Vietnam War.

Some of the charges of political correctness have not been unfounded, though the size and intensity of the public controversy fed less on real episodes than on a configuration of socially and intellectually unsettling issues that have been caught up under that label. Some have argued that charges of political correctness were little more than assaults on affirmative action, but I recall very well some of the instances that convinced me that there was substance to some of the criticism. One episode involved a job candidate who was Jewish. His chances to get the job became problematical when a few members of the department he was visiting began to wonder if he had the "correct" views on the Palestinians. The correctness of his political views threatened to displace the quality of his academic credentials for the position. Another sign of PC tactics appeared in our school paper which ran an ad from "Accuracy in Academia." It read, "Frosh Beware! Liberal Nebraska Professors Want to Control your Minds!" It pictured a bearded professor whose classroom was decorated with posters against nuclear power and in favor of workers on May 1, a bust of Lenin, and a map of Europe divided between the Imperialist West and Holy Mother Russia and her satellite paradises. The professor is saying, "Hey, A little political bias in the classroom is unavoidable." Accuracy In Academia promises to alert concerned students of the "latest atrocities of the Thought Police," and concludes, "Through our Dead White Males program (you know, Washington, Lincoln, Jefferson, etc.) we'll pay you cash for your story leads and articles." Both of these examples are to my mind legitimately labeled "political correctness" in that neither of them is concerned about the intellectual issues or quality of the academic work and both seek a punitive or intimidating action against someone because of their views.

Too much of the talk about PC has been accusation and denial, or politically biased definitions transparently in service of an agenda. As a result, the controversy has gone on and on, serving one political camp and then another, and keeping the academy on the defensive. Some on the left tried to defuse the label by explaining that it had all started as a self-deprecating joke among themselves, as if an "in" joke could hardly mirror a reality. But this is either ignorance or sophistry. In 1956 when Jessica Mitford published her little satire called "Lifeitself-Manship, or how to become a Precisely-Because Man," she perhaps produced the first glossary of politically correct "current usage." Numerous examples refer to "the correctness" of a policy or an "incorrect perspective" (A Fine Old Conflict, 323-333). Her target was, of course, the Communist Party's habit of correcting the views of its members and disciplining or even expelling those who would not accept correction. For an object lesson in political correctness from the 1950's, we need only look at the Stalinists on the left, or the McCarthyites on the right.

Authentic political correctness is about intimidating and punitive responses designed to shut down or shut up those whose views are deemed objectionable. As such PC is a violation of academic freedom and the protections of the first amendment. It may take the form of outlawing speech through restrictive codes, discriminating in hiring, promotion, tenure, and salary on an invalid basis, harassing speakers in order to keep them from being heard, reporting professors whose views are considered unacceptable, reassigning courses away from professors whose approach to the subject is not the current fashion, or socially ostracizing colleagues whose views one disagrees with. And the history of PC incidents suggest that neither right nor left, faculty, administration, nor student has any special claim to guilt or innocence, whether at the University of Texas, Dartmouth, Pennsylvania, CUNY, Wellesley, Nebraska, or dozens of other places where the incidents were less widely reported.

Two different configurations have confused our ability to separate out the abusive tactics of political correctness that have no place in the academy from other social, intellectual, demographic, and curricular developments that properly belong in the academy. One configuration has developed around the regulations from the Office of Civil Rights and the EEOC that required campuses to protect female, minority, and disabled students and employees from an environment that discriminated against them. On the whole these guidelines have been powerful tools to benefit protected classes, and the AAUP in its actions and its policies has supported the purposes of these regulations. Guidelines addressing a hostile learning environment have, however, been very problematic for higher education. Restricting speech runs counter to the tradition of the university as a place for the free expression of ideas. Since the "learning environment" often meant the classroom, the integrity of the classroom and the sanctity of academic freedom as a protection for the pursuit of knowledge have been threatened. Those students who found some ideas or speech offensive could seek punitive action against professors who expressed them on the basis of a hostile learning environment.

Administrations on many campuses have imposed speech codes and sexual harassment policies that violated first amendment protections, academic freedom, and due process. These codes were often created to meet the requirements of EEOC or OCR and to insure the institution against charges that it was not protecting the work environment. Yet, when civil liberties groups such as the ACLU or academic freedom groups such as the AAUP took these cases to court, the courts often ruled against the institutions. Although some administrators have to take the responsibility for especially invasive policies, they can legitimately argue to some extent that the "devil" made them do it. But because the guidelines addressed only the rights of protected classes, and because they sought to punish discrimination toward minorities and women, it was easy for opponents of affirmative action to label them "politically correct" and to forget that they sought to open up access, not close it down, and to punish discrimination, not free expression.

The second configuration that feeds the PC controversy is the intellectual and cultural changes that are behind multiculturalism and new philosophical ideas guiding study of the arts, humanities, and social sciences. In Telling the Truth, Cheney associates political correctness with new philosophies about the nature of truth which she does not accept. She writes, "An increasingly influential view is that there is no truth to tell." Her chapter on "Truth and Light" takes up the work of philosophers, historians, and literary critics whose theories she finds objectionable. She refers to the kind of new theories sometimes called post structuralism or neopragmatism, or clumped together by the unread as "deconstruction." Without question these theories are intellectually controversial and have broad implications for how one constructs the political and cultural world. But they are also unquestionably within the appropriate range of professional subject matter for academics. The fact that many reject these theories or find them threatening to the premises of the disciplines as they knew them does not mean that such ideas do not belong in the university and its classrooms, or that teachers and scholars who work in these areas are "politically correct" merely on the basis of their interests.

One critic has said that the changes in critical practices constitute "a kind of paradigm shift in the humanities" (Judith Frank, Wild Orchids and Trotsky, 129). Some argue that including noncanonical works in the curriculum will lead to the "deculturation" of America, and conclude that those who teach outside the canon must have the political intention of subverting American values. Hence the easy charge that such teachers use the classroom for political purposes. But questions about what constitutes the culture or cultures of America are equally valid, and they cannot be raised for discussion if one must accept without question the supposed "culture that unites, even defines" the real America (George Will, quoted in Frank, 133). To shut down such questions or to punish those who answer them differently would, I believe, be real political correctness, whether imposed on the professor by other authorities, or imposed on the students by the professor. The association of political correctness with such issues as affirmative action, multiculturalism, race and gender sensitivity, and current intellectual controversies has muddied the clear distinctions we need to make between controversial issues and repressive strategies.

As long as controversial issues and repressive strategies are linked, we will not be able fairly to adjudicate the cases or quell the publicity. The ensuing confusion has prevented us, as an academic community, from mediating these campus controversies in constructive ways that could defuse the anger and ameliorate the injury. And it has prevented our setting a standard by which to identify politically correct strategies and fully condemn them. The result is a growing sense both of living at risk in a hostile environment and of being vulnerable to capricious authorities who are eager to punish us for creating it.

Last year's PC controversies centered on speech codes, but after the courts ruled repeatedly that most of them are unconstitutional, some institutions, such as the University of Pennsylvania, moved to drop them. Yet, this issue seems likely to resurface in light of new guidelines published by the Department of Education. These rules contain several requirements that appear difficult to implement or adjudicate. For example, an institution may be found guilty of creating a racially hostile environment through harassing conduct which is verbal. Institutions are also directed to provide a nondiscriminatory environment which meets the needs of students of different ages and background because "an incident that might not be considered extremely harmful to an older student might nevertheless be found severe and harmful to a younger student." Somehow, institutions will be required to anticipate such circumstances and to judge the difference. The guidelines observe that "in most cases" harassment will require more than casual or isolated incidents, but that "in some cases, a racially hostile environment requiring appropriate responsive action may result from a single incident." The question of how one can know when a single incident meets this criterion will be difficult to answer. "Racial acts need not be targeted at the complainant, and the harassment need not be based on the victim or complainant's race, so long as it is racially motivated (i.g it might be based on the race of a friend or associate of the victim)." Racial harassment indirectly involving a second party will be difficult to assess. In determining its response to violations of the guidelines, the Office for Civil Rights will consider "any applicable antiharassment polices" the institution has in place, a consideration that could inspire more unwise and unconstitutional codes than we have already seen.

Instead of limiting the concept of hostile learning environment in colleges and universities, these new guidelines seem to broaden and complicate it. Administrators face new pressures to follow guidelines that are certain to run into legal dispute. Codes that allow for enforcement on the basis of motivation are even more ambiguous than those that tried to judge specific words or acts. The contradictions between the bent of OCR regulations and the decisions in the courts seem likely to perpetuate the conflict between hostile environment and the first amendment instead of resolving it.

This year the national AAUP has seen a significant increase in charges that a hostile environment for learning was created by things said in class of a sexually offensive nature. Although sexual harassment charges once primarily focused on sexual advances directed at one's student, the recent rash of cases is aimed at language or ideas used in a classroom that a student interpreted as creating a sexually demeaning climate. Increasingly targeted are gay professors and feminist professors who offend straight or traditional students. One recent episode charged that a gay professor created an hostile environment for straight men by putting numerous books on his syllabus by gay writers. Two prominent feminist scholars have been targets of gay and straight female students who complained that they were hugged or kissed by their professor. A number of cases involve ideas or words used in the classroom. Certain aspects of women's status in society or minorities in history have been deemed offensive even to hear discussed, and words such as "vibrator," "banana," and "water buffalo" have been interpreted as obscene or hate speech because of the context which the student construed. In short, an increasing number of sexual or racial harassment complaints contain a distinct question of academic freedom.

BEST COPY AVAILABLE

The distinctions between sexually and racially harassing acts or hate speech and sexual and racial course content or vocabulary that may create what some feel to be an environment hostile to their learning are entirely too hazy and subjective. The AAUP has found no acceptable standard whereby speech that "interferes with learning" can be adequately proscribed, yet for any policy to be fair, it must provide a reasonably clear and administrable standard. We should not be required to guess at where the zone of forbidden expression lies in determining what one may say to colleagues and students in the classroom, or in spontaneous exchanges as part of academic discourse. Yet, numerous professors have lost their jobs, or been subject to long, excruciating hearings before being cleared, on just such guess-work. Furthermore, such arbitrary and ambiguous complaints threaten to undermine the argument that some classroom speech could legitimately be judged as harassing.

The 1940 statement on Principles on Academic Freedom and Tenure says that "Teachers are entitled to academic freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject." The appropriateness of professionally protected speech can only be judged by other professionals who know what is reasonably relevant to the field, but many grievance procedures used for harassment cases lack the kind of peer review components necessary in academic freedom cases. Unionists, administrators, affirmative action officers, and faculty must safeguard academic freedom even as we seek to stop harassment.

Ironically, irresponsible charges of political correctness have allowed the regulations that were created to open the academy to women and minorities to be used to attack their place in these institutions, or to threaten the professors who wish to include their culture as part of the curriculum. The classroom on many campuses has been chilled by fear of retaliation for expressing ideas or using language that someone feels creates an hostile environment. Many untenured professors have told me that they are withdrawing certain books and topics from their syllabi for fear of getting into trouble by teaching them. We have a collective professional responsibility to speak out against the strategies that are meant to repress and punish those whose views are unwelcome, whether it involves student activists who destroy the campus newspaper because it contains racially troubling stories, or public officials who encourage students to report professors whose views seem too liberal, or federal guidelines that misunderstand the dynamics of the classroom.

We must demonstrate to ourselves and our public that politically correct tactics are intolerable affronts to the fundamental nature of the academy as a place for the free expression of ideas, but we must also make it clear that programs and plans that pursue affirmative action, a multicultural curriculum, new philosophies and theories, and a welcoming environment for all are not in themselves "politically correct."

C. THE IMPACT OF CLINTON'S HEALTH CARE PROPOSAL ON HIGHER EDUCATION

VirginiaAnn G. Shadwick, President
National Council for Higher Education, NEA

This paper is not intended as a detailed analysis of the various health care plans now before Congress, but rather an overview of what their impact might be on higher education given any form of national health care. Certainly, it is possible to generalize on the likelihood of a number of outcomes, regardless of the final configuration. First, the final program will be a compromise composed of elements from the many plans now under review, or even a different proposal not yet developed. Second, while higher education may pay more initially, it will not necessarily be as much as will be required to maintain the current level of coverage in the longterm, given the trend for dramatic increases in costs for health care coverage. If nothing is done, we can assume that the trend of recent years in bargaining to control health care costs will escalate. Finally, it must be recognized that any change will have an impact, because the higher education community, especially on unionized campuses, is among the elite in this country when it comes to health care. A National Education Association survey of its membership conducted in 1993 indicated that 99.8 percent of higher education faculty members had health care insurance available, as compared to 98.2 percent of the education support personnel; 93.6 percent of the faculty and 81.1 percent of support personnel actually participated in the offered plans.

To provide a brief background to the current discussion, it is estimated that somewhere between 39 and 50 million Americans are uninsured and about half of the population has less coverage than the Clinton plans offer. Of those Americans without health insurance 80 percent are employed! In 1990, the US spent $2,566 per citizen on health care as compared to $1,770 in Canada and $972 in the United Kingdom. This cost figure was estimated to rise to $3,380 in 1993. In the public sector, higher education budgets are being dramatically impacted as currently Medicaid is the fastest growing part of most state budgets. Indeed, in 1992, states generally spent more on Medicaid than higher education. In addition, the increasing cost of providing care for the uninsured is driving higher education benefit budgets up at an alarming rate.

Two recent issues of CUPA News (March 14, 1994 and March 28, 1994) summarized a survey conducted by the College and University Personnel Association and the Washington Higher Education Secretariat Health Care Reform Task Force. The survey covered 522 institutions in all states, except Nevada, but included the District of Columbia and Puerto Rico, and asked questions relating current coverage to proposals in the Clinton plan. With respect to the employer mandate requirement, most of the responding institutions indicated they subsidize at least 80 percent of the premium for single coverage and about one-third for family coverage for faculty and staff.

While current coverage is generally better than the Clinton standard benefits package, 63 percent indicated they would not be likely to reduce current benefits to conform with the national package. With respect to the Clinton proposal that a 7.9 percent payroll tax be imposed, 39 percent of the private and 43 percent of the public four-year/graduate institutions and 53 percent of the public two-year institutions indicated they currently spent 8 percent or more on health care coverage.

The Clinton language on full-time employees does have a significant impact on higher education. The definition states an employee "shall be considered to be employed on a continuing basis, that, taking into account the structure or nature of the employment in the industry, represents full-time employment." Under this definition, one-fourth of the current part-time faculty and staff would be considered full-time. The CUPA survey indicated 62 percent of the part-time faculty and 52 percent of the part-time staff had no coverage and 49 percent of the responding institutions indicated they provided no medical coverage for their part-time employees.

Currently, the Clinton proposal does not penalize programs which are better than that in the standard proposed package. Specifically, language has been added to specify that any dollars spent by an employer picking up the deductibles, co-pays, or co-insurance for either the average-price plan or a more expensive plan will not count as taxable income to the employee. However, in the long run, higher education employees must recognize the coming reality that from the federal perspective there is an enormous potential revenue source from taxing fringe benefits: holding off this taxation may be quite temporary.

Students would clearly gain under the Clinton proposal, since they are guaranteed coverage under their parents' plan until the age of 24 and then they would be covered like any other citizen. Currently, 50 percent of those who are 18 to 24 lack coverage. There is a concern that those students now covered by campus plans will have to pay more and at the same time lose the specialized care they now receive on campus. However, the other side is that they would keep medical coverage upon graduation which is not currently the case.

Higher education retirees also remain among the elite with respect to health care coverage in this country. Currently, public colleges and universities, according to

CUPA, are likely to offer some form of subsidized retirees medical coverage for both pre- and post-65 age groups. Under the Clinton plan the option to fund retiree health care benefits through a retirement system is eliminated; and by 1998 a three-year levy of 50 percent of "early retiree health care costs" would be assessed against employers who currently provide such coverage.

A major change for the majority of colleges and universities will be the loss of control over any facet of their health care benefit plans. They will pay a percentage of payroll for guaranteed coverage, but will have no say in what the coverage is or how it is administered. From the employee side of the table where such programs are bargained, health care will be all but removed from the scope of bargaining. There remains in the Clinton plan a single one-time exception for private colleges and universities with 5,000 or more full-time employees to form a separate corporate alliance under the alliance proposal.

Public sector colleges and universities will be forced into regional alliances established by federal or state governments. This has a major impact for states like Michigan with its health care trust, MESA, and California's Public Employees Retirement System (CalPERS). Ironically, CalPERS has been highlighted by the Clinton administration as an example of a "well managed alliance," but under the Clinton proposal it would be out-of-business with respect to health care. The bottom line in both the public and private sector, with the single private sector exception cited above, is that colleges and universities which now directly purchase health care or participate in selected trusts or alliances, will no longer be able to do so or to negotiate what they do.

Finally, there is an unknown aspect to the Clinton plan raised in the March 30th Chronicle of Higher Education. With the increasing pressure of the federal deficit, a major impact of the Clinton health care proposal would be a cut in research dollars for bio-medical and psychological research. Currently, there is no clear language in the plan to support such a fear, but neither is such research guaranteed at current levels. As with so many questions with respect to the proposal, the end result remains an unknown.

In conclusion, we must acknowledge that health care will change and the new system cannot but have an impact on health care coverage as now offered by our colleges and universities. Our various affiliates and other higher education groups are all actively lobbying Congress with respect to their organizational position on the issue. For example, the National Education Association is actively supporting universal coverage, comprehensive benefits, meaningful cost controls, quality assurance mechanisms, fair and equitable financing, the ability of states to implement a single-payer plan (preferred by the NEA), preservation of tax-free status of employer-provided health benefits, and protections for Medicare recipients. In the end, one question remains for all of us, particularly when the first-hand analysis could suggest that the higher education community stands to lose under any move to national health care: Can we really afford not to move in the direction of major health care reform?

D. HEALTH CARE WORKERS AND HEALTH CARE REFORM

Dennis Rivera, President
1199, National Health and Human Service
Employees Union

The health care reform debate now before Congress presents health care workers with the biggest challenge we have ever faced. That challenge brings with it the opportunity to realize basic health care principles America desperately needs, principles like universal, comprehensive, affordable, quality health care coverage with cost controls, employee protections, mandatory employer contributions, and state options for a single payer system.

But on the other hand, there is a real danger that change will instead unleash forces in the industry that would jeopardize quality health care and shatter gains made in recent years by health care workers and their families.

The best guess is that some kind of legislation will be adopted by next November. Our 120,000-member, New York-based union entered this debate favoring a single payer system of the sort introduced in the Senate by Senator Paul Wellstone and in the House of Representatives by Jim McDermott and John Conyers. So did most of the nation's health care unions and most of New York's Congressional delegation.

We wanted a system like the one in Canada, where the public is infinitely happier with their health care delivery than we are with ours, where everyone is covered as opposed to our 40-million people without health insurance, and where health care amounts to only about 8 percent of Canada's gross national product compared to 15 percent of ours.

But that is not to be, at least not this time around. Congress will not pass the Wellstone bill. As a matter of fact, it will not pass a recognizable form of any of the bills now before it. What is going to happen for the next several months is a cut-and-paste process in which a compromise measure will be pieced together from parts of the President's proposal and parts of its competitors.

With this in mind, we are avoiding the shifting sands of specific legislation. Instead, we are standing on the solid rock of basic principles. On March 7, leaders of unions representing several hundred thousand health care workers in 10 states and the District of Columbia met in Washington and formed America's Health Care Workers' Coalition. Our purpose was to adopt a set of basic health care reform principles and to devise an action strategy to try to attain them.

Let me review the eight principles we adopted, principles that we feel are vital for any true reform of our health care system:

1. **Universal Coverage.** Any reform must involve guaranteed, affordable health care for every American, not just accessible to those able to buy it. Also, timing cannot be open-ended. Universal coverage must be achieved by a specified date.

2. **Employer Mandate.** All employers must contribute their fair share. Under many union contracts, employers now pay all the cost of employees' health care. Employers also pay all or part of the costs for many non-union health care plans. But employer-paid insurance is now voluntary, with quality of benefits and coverage often dependent on employees' unionized strength. Reform must mean that employers have to pay at least 80 percent of health care costs. Of course, unions must retain the ability to collectively bargain for employers to pay the entire costs of health care. Our members have that now and they intend to settle for nothing less in the future.

3. **Comprehensive Benefits.** Any health reform benefit package must ensure a full range of medically necessary health services, including prescription drugs, preventive care, mental health, and at least a start on long term care. Proposals that would tax workers' health care benefits or limit the deductibility of health care expenditures by employers are unacceptable.

4. **Affordable for All.** Health care must be affordable for everyone, including early retirees, the unemployed, and low income workers.

5. **Real Cost Controls.** Competition cannot control health care costs. With hospital downsizing and health care employers developing monopoly-like HMO-based health care networks, we need real, enforceable cost controls, like premium limits and fee schedules. Otherwise, the crisis of rising costs will continue.

6. **Quality of Care.** Consumers, not employers, must be able to choose their own doctors and plans. A two-tier system providing lower quality care for the poor and sick is unacceptable. Our members plan extensive lobbying activity here in Washington, a major publicity campaign, and a mass rally June 8 at our nation's capitol. One theme we plan to stress in talking to our representatives is to ask them to pledge not to vote for any system that would give members of Congress and their families better health care than the new system would give us. Quality patient care also depends on proper staffing, job security, and an enhanced role for front-line health care workers.

7. **Single Payer Option.** In New York State, most legislators, unions and hospital employer organizations favor creating a single payer health care system financed by tax dollars. The single payer option is the most comprehensive, universal, and cost effective health care reform. New York

and many other states are considered strong possibilities to choose a single payer system after Congress acts. But that can only happen if Washington's health care reform gives states that option. National health reform should set a floor, not a ceiling, on what states can do.

8. Worker Protections. To prevent massive unemployment and economic chaos caused by health care restructuring and reform, more attention must be paid to retraining efforts and to protection of collective bargaining rights.

I would like to spend a little time on this, because it is important. Our country has 10 million health care workers. Right now, today, before any health care reform is passed, these 10 million workers are experiencing enormous changes in their industry. Our nation's health care system is being restructured in a process that is shaking it to its very core. Restructuring includes hospital downsizing, hospital mergers and networking, shifting of care from hospital-based to clinic-based facilities, development of off-site satellite facilities, combining of jobs and cross-training, and management pressure to replace full-time workers with part-timers. These are some of the sources of layoffs and job insecurity felt by many members of our union and health care workers throughout the country.

This process is spurred by cost-cutting and new technology, and it includes decentralized delivery systems that emphasize primary, ambulatory and preventive care. At the same time, we are seeing massive corporate networking of health care institutions.

Restructuring is taking place side-by-side with health care reform, sometimes spurring on reform, sometimes being spurred on by it. You can be sure that reform, when it is adopted, will accelerate trends already well-established.

At the center of the process are the jobs of 3.6 million people who work in our nation's hospitals and more than six million others who work elsewhere in the health care field. Some of the trends that affect them include:

A. Hospital Downsizing. New technology, increasing medical costs, increasing cost surveillance by insurance companies, and the growth of managed care and health maintenance organizations (HMOs) are all driving hospital occupancy rates and lengths of stay down. A recent American Hospital Association (AHA) national survey found 27 percent of hospital managers planning workforce reductions. At hospitals with 500 or more beds, the survey found 51 percent plan layoffs. The top three targets are service staff, middle managers and registered nurses. Special targets include "hotel-like functions" such as dietary, housekeeping and other service and maintenance jobs done by many of our union's members. Recent government estimates say hospitals will have one-third fewer service workers in the year 2000 than they had in 1980. New treatments and technology mean many procedures now done in hospitals can be done in doctors' offices and clinics. Nationally, 60 percent of all surgeries are now done outside of hospitals. By the year 2000, an estimated 80 percent will be.

The average length of hospital stays have fallen from five days to under four since 1985. Occupancy rates have been falling since 1981. An AHA estimate shows one-third of the nation's 925,000 hospital beds are empty on a typical night. New York occupancy rates are now about 80 percent. Some 80,000 beds will be eliminated nationally by the year 2000, say experts.

Declining hospital jobs do not necessarily mean fewer health care workers, however. Early government estimates say restructuring and reform may bring a net increase in health care jobs. Though some critics dispute this, one thing is certain: our industry is undergoing a massive shift in where jobs are. Many new jobs will be in clinics, doctors offices and health maintenance organizations (HMOs), and skilled jobs have a better survival chance than unskilled.

B. Networking. Structural imbalances in our health delivery system are also prompting change. Most of the country's explosive health care spending has gone to hospitals, at the expense of preventive care. As a result, hospitals now are the most expensive component of the health care system.

What will the newly restructured system look like? In their bid to cut costs, streamline care-giving and eliminate waste and duplication of services, hospital managers are beginning to organize integrated care networks. These networks include hospitals, but care is increasingly centered in outpatient clinics, doctors' offices and HMOs. Big hospitals are joining forces and buy up or affiliate with smaller institutions, including clinics and nursing homes.

Hospitals across the country are merging at record levels: the Justice Department recorded 56 filings for hospital mergers in fiscal year 1992, more than double the previous year. But studies are showing a down side to hospital downsizing and merger mania. A recent Hospital Research and Education Trust study says mergers often mean reduced acute care services. And the Amherst, N.Y.-based E. C. Murphy Ltd., in a 281-hospital study, found hospitals with across-the-board staff reductions of 7.75 percent or more, are 400 percent more likely to see increased patient illness and mortality rates.

C. A Market-Driven System. In this year's state of the union address, President Clinton said his reform program would work "by using the market to bring down costs and achieve lasting health security." That would spell an end to a complex system of controls and supports evolved mainly on the state level. Will deregulation and a market-driven system bring down costs? That remains to be seen. During the 1980s, the air transportation, telephone, trucking, auto and steel industries were deregulated. Thousands lost jobs, unions were weakened, and workers were forced to give back billions of dollars in wage and benefit concessions while consumer prices continued rising. While the positive effects of health care deregulation are doubtful, it is a sure thing that unregulated competition will do away with important state programs that have served the health care industry well. Some of these include reimbursement mechanisms that reward inner city hospitals which care for a disproportionately high percentage of non-paying patients, many of whom are undocumented immigrants.

D. New Job Definitions. A national trend that is well-advanced could completely eliminate hospital job classifications as we know them. This trend is associated with new technology, but is primarily about cutting labor costs. Following patterns already established in other industries, hospital managers are pushing to eliminate some job categories, combine jobs, cross-train workers, and supplement fewer full-time workers with more part-time, temporary and contract workers.

Management usually speaks of flexibility and efficiency when it presents these changes. But opponents warn that changing who does what, if done the wrong way, could reduce professional standards, pit different categories of hospital workers against one another, and produce stressful and dangerous speed-up.

These trends are happening whether we like them or not. They present dangers and opportunities. Health care workers need to have a voice in this reorganization of work, so we can help shape a system that is good for both patients and workers. We are all for efficiency, but our goal is that any changes improve patient care, do not create untenable working conditions, and provide fair compensation for new duties.

One illustration of the hospital industry's commitment to changing job descriptions is the New York Department of Health's (DOH) Hospital Workforce Demonstration Program. DOH demomstration projects in 27 hospitals around the state waive existing regulations and experiment with new job categories in nursing, physical therapy, respiratory therapy, labs and radiology.

Conflicts arise here and around the country when nurses aides are asked to do simple x-rays; when lab techs are asked to work in chemistry, hematology, bacteriology and blood bank; when radiology techs are asked to do special procedures like CAT scans and MRI; or when all-purpose service workers are assigned dietary, housekeeping and nursing functions.

At one Brooklyn hospital, we are negotiating with management over a proposed patient care tech category that would take pieces of job responsibility from nine existing 1199 job classifications.

Experimentation around the country includes a West Coast hospital that is almost completely automated, with the elimination of most service workers.

One "care pair" model tried in a Florida hospital reduces the number of hospital workers a patient has contact with, for almost all functions, to two - an RN and a technician. At bedside, the "care pair" - aided by computers and other high-tech innovations - do paperwork, cooking and technical functions usually reserved for other professionals. The result: a 25 percent reduction in staff.

We are all for economy, but we do not want economy made by sacrificing care. We do not want economy mady by tossing hundreds of thousands of hospital workers onto unemployment lines that are already too long. With that in mind, our health care workers' coalition proposes the following as our eighth principle for health care reform:

- Faced with massive layoffs, we need substantial government funds for training higher-skilled health care workers.

- We need funds to train displaced workers for other community service jobs, like child care services, counseling and community food programs.

- Workers affected by mergers or consolidations must be able to stay at their present jobs or be put in a priority pool for rehiring into newly-vacant jobs in the same geographical area. Also needed are special financial assistance for displaced workers, including supplemental unemploy-ment benefits, and a job bank listing available area health care jobs.

- Benefits must become portable, so workers do not lose pension, vacation or other seniority related benefits and rights when employers merge or consolidate.

- Health care employers must be required to give 90 days notice of any anticipated lay-off, with penalties for failing to give such notice.

How will changes affect our collective bargaining agreements? What about the right to organize? 1199's proposals for worker protection include:

- We need legislation requiring employers to accommodate the creation of Employer Participation Committees to discuss quality care issues.

- We need a strict ban on the use of federal funds to oppose, delay or interfere with organizing, and a ban on striker replacements.

- Prompt union recognition and collective bargaining, if 60 percent of employees sign cards showing they want a union, must become the law of the land.

- Legislation must require prompt union elections in health care facilities, once appropriate petitions are filed.

- Laws must provide that new employers resulting from mergers, acquisitions, or consolidations retain current employees and recognize any existing union representing the majority of workers in the new work-place. Union contracts must be honored until their normal expiration dates, at which time bargaining for a new contract will take place.

In recent months, I have traveled to dozens of our hospitals and nursing homes to talk with members of our union about health care reform. One day last month, I visited a major hospoital in Bedford-Stuyvesant section of Brooklyn. I wanted to discuss reform's impact on the restructuring now going on in our industry. But the workers I was meeting with were facing layoffs right then, at that moment. They told me they did not want to hear about health care reform. They wanted to hear about how we were going to fight layoffs. They were facing an immediate crisis brought on by the application of harsh market principles that place profits before the needs of human beings.

President Clinton says he wants the market to regulate the health care industry and to control costs.

But we know that putting unregulated, competitive market economics before the welfare of patients will never bring fairness to the system. It will not bring down costs. Instead, the human cost of such an approach -- in jobs lost, communities devastated -- could cancel many of the benefits sought by any reform proposal.

In closing, I would like to stress three points:

First, as health care workers the members of our union are all too aware of the terrible shortcomings of our current health care delivery system. They chose this industry, because they wanted to help people, and it hurts them to work in a system riddled with inequity and inflation. As much as anyone in this country, they want true reform that makes quality, comprehensive health care accessible to all.

Second, most of our members are minority group members and women. Many are heads of families. As a result of restructuring already underway in the health care industry, they live in constant fear of losing jobs they simply cannot afford to lose.

And finally, in the give and take going on inside the beltway over the final form of reform, our leaders have got to listen to the country's 10 million health care workers. We are arguing that legislators look beyond the accountants' bottom line. We are arguing for reform that protects quality patient care and also protects the dedicated people who give that care.

In the months to come, we will be making that argument loud and clear. We will make it in the media, in Congressional offices, and in the streets. I invite you to join us.

III. LEADERSHIP IN HARD TIMES

A. The Fiscal and Political Stresses Plaguing Higher Education Today

B. Partnerships in Uncertain Times: The California State University and The California Faculty Association

C. The Situation of Higher Education in Quebec: Some Thoughts on the Challenges Facing the Academic Union Movement

D. Recent Trends in Collective Bargaining in Canada

LEADERSHIP IN HARD TIMES

A. THE FISCAL AND POLITICAL STRESSES PLAGUING HIGHER EDUCATION TODAY

Sean A. Fanelli, President
Nassau Community College

Henry Adams once observed that "practical politics is the art of ignoring facts."

Conversely, in academe, we are driven by the search for absolute truths.

This conflict between our academic mission and practical politics forms the basis for the fiscal and political stresses that plague much of public higher education today.

This conflict between town and gown is not unique to New York or even to public higher education, or even to community colleges such as Nassau, but our experience is a textbook example of a very stressful situation. A situation, I might add, that is further complicated by a two-level budget timetable beyond our control, beyond our ability to even affect and sometimes, I think, beyond anybody's ability to understand.

All of my remarks might well apply to the City University of New York, as well, but I will limit my presentation to my own personal experiences with the State University of New York.

SUNY, as many of you know, is divided into two fiscally distinct, but academically inter-related groups. The 37 State Operated SUNY campuses all look to a single principal governmental funding source: The State of New York. The community colleges look to two, the State and the local sponsor.

If the State Legislature meets its own deadlines, SUNY's four University Centers, four Health Science Centers, thirteen four-year University Colleges, four Specialized Colleges, six Statutory Colleges, and six two-year Colleges of Technology/Agriculture have their budget and their tuition rate in place on or about the first of April.

On the other hand, the thirty SUNY community colleges must also seek a major portion of funding from a local sponsor. In our case, as in most SUNY community colleges, this is the local county government.

The second phase of our annual funding battle only begins after the State Legislature settles on how much State aid they will provide. This situation is complicated in New York State by the traditional battle between the interests of New York City and non-City interests.

As you know, there are three major players in Albany: The Democratic Governor, the Speaker of the Democratically controlled State Assembly, and the Majority Leader of the Republican controlled State Senate.

Although the names and the faces sometimes change, this situation has been basically unchanged during my entire 12-year tenure as President of Nassau Community College.

Our current Governor has never adequately provided for SUNY community colleges in the Executive Budget he submits to the Legislature each January. He has stated that he feels community colleges fall under the Aid to Localities Program, and as such fall within the purview of the Legislature. As a result, we seldom have any idea of how much State money we will receive until the State Budget is finally approved after last minute maneuvering and compromising between these three factions. I can tell you this, it is never what we need and never what the people of New York were promised when community colleges were established.

To help you better understand what I mean, it is necessary to look at a little history.

I am indebted to Dr. Freda Margens, the retired Dean of Planning and Information Services at Dutchess Community College for her research and her cogent paper on "The Historical Development of the Community Colleges of the State University of New York."

You may be surprised to learn that New York was last among all the states to establish a statewide community college system. When the enabling legislation passed in 1948, it was the result of a political compromise between those who wanted the two-year colleges to be state institutions, built and maintained with state funds, and responding to state authority and those who wanted them funded like secondary schools with local levies supplemented by state aid.

The law that emerged provided that capital costs should be shared equally by the State and the localities and that operating costs should be financed one-third by student fees, one-third by local contributions and one-third by state aid. As you shall see in a few minutes, this three legged stool, once so carefully balanced, has become lopsided.

Once this law was passed, community colleges began a rapid period of growth in New York.

The first opened in Orange County in 1950 helped along by the gift of a $3 million estate to serve as the campus. By

1960, 18 community colleges were in existence, including one in Nassau. Statewide enrollment approached 12,000. Seven years later, that number increased seven fold to nearly 80,000.

By the 1970s, the number of full- and part-time students enrolled in SUNY community colleges passed the 100,000 mark.

This rapid growth created a series of problems related to accessibility for all students, the quality of programs and the need for increased fiscal support in an era of rising costs.

The legislature adopted the Full Opportunity Program of 1970 to guarantee an appropriate program for all current high school graduates and veterans in the sponsorship area, thereby expanding the mission of the community colleges to include "at risk students," students for whom counseling and remedial work would be needed. The incentive to provide this more expensive full opportuhity, was increased operating aid from the State, from the old 33 and a 1/3 to up to 40 percent.

Throughout the 70s and 80s and into the 90s, community colleges continued to grow. Today, there are 30 SUNY community colleges serving some 200,000 full and part-time credit students and thousands more who attend not-for-credit continuing education classes. This number of undergraduates enrolled in community colleges has recently outstripped the number of undergraduates attending State Operated Campuses. Community colleges now account for 51 percent of all SUNY undergraduates. We have become the most important component of the State University system to the greatest number of undergraduate students.

As we have become a more important component of the total higher education picture in New York State, how have community colleges fared fiscally? Far poorer than the promise. Up to 40 percent was promised to those community college offering full-opportunity; an incentive that all SUNY community colleges eventually grasped. The reality has been something else. One reason for this is the language of the enabling legislation. It stated that participating colleges would receive either 2/5ths of net allowable operating costs or a per capita formula -- whichever was the lesser of the two.

Guess what? Today at Nassau, providing remedial English, reading and math is one of our most costly programs, as I'm sure it is at other community colleges. Does our state aid approach 40 percent. No, it doesn't even reach the originally promised one-third.

Let us look at the last eight years. We did the best in 1988, when just over 30 percent of our then 75.5 million dollar budget came form the State. In every other year, it has been less than 30 percent falling to a low of just over 27 percent in the current fiscal year.

As you can imagine, as the State's share dropped, the other partners were forced to pick up the slack. But that's only partially true. The local sponsor share did reach a high of 36 percent in 1989, but by 1991 it had dropped to under 28 percent. In fact, between 1990 and 91 the total Nassau County share dropped by more that 3-million dollars, and has not increased since.

As a result, the remaining partner -- the students -- have born the brunt of added costs. Student tuition, which stood at $1,330 dollars annually in 1987 has risen to $1,850 today. That's an increase of nearly 40 percent.

Some SUNY community colleges have been forced to raise tuition as high as $2,100. The people's college, indeed! At this rate, we will soon be priced out of the ability of many people to pay, especially those who are working, raising a family, and trying to improve their future prospects by putting themselves through college.

What should community college tuition be? Californians who move to New York are astounded by our tuition. In California, community college tuition is a nominal $50 a year. From the point of view of providing an education to everyone who is motivated, that makes sense. A better educated community attracts the high tech business every locality is seeking.

But, I digress from outlining our stressful budget process. Before I can describe the County role in our revenue picture, I must tell you that Nassau Community College has always enjoyed excellent support from elected officials at the County and State level. For this we are grateful. That does not mean, however, that the system could not stand a rational overhaul.

To fully understand the difficulty we have in preparing the revenue side of the budget, let me give a quick glimpse at the expenditure side.

Our process begins in January and February when we finalize our preliminary spending estimates. There is not a lot of room to maneuver. Like all higher education enterprises, we are labor intensive. Salaries and fringe benefits -- almost all of which are contractually mandated -- comprise 85 percent of our total outlay.

Sponsor services account for nearly 6 percent more. The bulk of that is the mandated cost of heat and electricity from the county-operated power plant.

Thus, we are left with less that 10 percent to pay for all of our equipment, from test tubes to our main frame computer; for all our supplies, from paper goods and laboratory chemicals to textbooks, for more than 22 thousand students. From this less than 10 percent, we must also purchase supplies to maintain our 225 acre campus, grass seed, fertilizer and so forth, and to hire outside contractual services from computer maintenance and copying machines to knife sharpening and medical services. Within such a budget there is almost no room to maneuver. You cannot teach students without teachers, so we cannot make major personnel cuts without turning away students.

When State Operated campuses prepare their annual budgets, they estimate the number of students for the next year. Their tuition revenue and state support is based on that number. When they reach that number, they turn away students.

It is not the same at the community colleges. Most of our revenue is student driven. If we turn away students, we not only loose tuition income, but we lose state aid as well, since it is based on the number of full-time students in our classrooms.

In fact, in recent years we have been more successful than our wildest dreams. In a shrinking marketplace, our outstanding academic reputation has consistently propelled us beyond our most optimistic enrollment estimates. As a result, we have generated surplus income that has helped us stabilize local property tax rates and keep tuition costs down.

So, while the money to pay for faculty is a major budget expense, the students attracted by that faculty is a major revenue source. If we cut one, we adversely affect the other.

Compounding our problem, and this should be of special interest to you, is the fact that we as educational administrators have very little impact on the fiscal side of the collective bargaining process.

We have no input into the negotiations with our civil servants, who comprise nearly 40 percent of our workforce and only advisory impact on faculty salary negotiations.

All final decisions on money are in the hands of the County's elected officials and their appointed negotiators, and most recently they left us to reap what they had sown.

When the Governor, to his credit, negotiated a salary increase for the faculty at State Operated campuses, he put the money to pay for it into his budget. Not so in Nassau, when the County negotiated a raise for our teachers, they failed to increase their contribution by one penny. With that in mind, let us pick up the story of how our budget comes into existence.

As I said, in the best of all possible worlds, the State Legislature agrees to a budget in early April. Then we at Nassau and the other SUNY community colleges, know a key ingredient of the revenue side. Once we know how much the State will fund, we are able to calculate how much we will need from the local property taxpayers and how much from students in increased tuition. What we do not get from one, we must get from the other. The only other alternative is to cut expenditures, but, as I have already demonstrated, we have very little room to cut.

With no input into salary negotiations, the only way to significantly reduce personal costs might be to cut programs. If we cut programs to cut teaching staff, we also cut revenue. Then, to make matters worse and add to our stress, in the same year the sponsor negotiated a major salary increase for faculty, they reduced take home pay to my administrative team, and took our entire surplus to prevent an increase in the local contribution.

At this point, I can hear the words of The Old Philosopher in my head, "Is that what's troubling you?"

As a matter of fact, there is more. We cannot even turn down the thermostats in most of our buildings or reduce air conditioning in warm weather because the flow of hot and cold water that heats and cools our new campus is controlled by the sponsor-operated utility plant, and the cost figure is set in advance by the sponsor.

What can we do to save? Maintain a little less, do not replace worn-out outdated equipment, hire a little slower, consolidate classes up to the limited capacity of our classrooms, and pray for a more rational funding system.

And if this were not stressful enough, the local political situation on a closely divided Board of Supervisors insures that the final adoption of our budget does not occur until late August, the very end of our fiscal year.

As a result, we do not know from year to year how much money we will have to serve the third largest student body in New York State until a few days before we actually open the doors for the new Fall semester.

Sometimes we do not even know what the final tuition figure will be until AFTER we have sent out tuition bills. Last year, the County reduced the tuition increase approved by College trustees long after we sent out tuition bills. As a result, we were forced to make 6,319 refunds ranging from 50 cents to 50 dollars.

These circumstances bring to mind the scenes from Alice in Wonderland. Not only Alice's head scratching, "curiouser and curiouser," but the Queen of Hearts' demand for "Sentence first -- verdict afterward."

And there you have it, a textbook example of the fiscal and political stresses plaguing just one phase of higher education today.

I am afraid that former Canadian Prime Minister Pierre Elliot Trudeau was only dreaming when he said, "In academic life you seek absolute truths; in politics you seek to accommodate truth to the facts around you."

In reality, we in public academe must also accommodate truth to the political facts that surround us.

B. PARTNERSHIPS IN UNCERTAIN TIMES: THE CALIFORNIA STATE UNIVERSITY AND THE CALIFORNIA FACULTY ASSOCIATION

VirginiaAnn G. Shadwick, President
National Council for Higher Education, NEA

The California State University (CSU) is a system comprised of 21 institutions extending from the Oregon border in the north to the Mexican border in the south; in the fall of 1995 a 22nd institution, the California State University, Monterey Bay, is scheduled to open on the site of a former army base, Fort Ord. The systems enrolls 247,000 full-time equivalent students and employs 17,500 full-time and part-time faculty members including coaches, librarians, and counselors. The California Faculty Association (CFA) has been the bargaining agent for this unit since 1983 and is affiliated with the American Association of University Professors (AAUP), the California State Employees Association (CSEA), the California Teachers Association (CTA), the National Education Association (NEA), and the Service Employees International Union, AFL-CIO (SEIU). The master contract has been negotiated and re-negotiated several times and the bargaining relationship has been typical of that found in early years of bargaining: rocky at best and often quite negative.

Two fundamental realities should be underscored which affect all aspects of the bargaining relationship as it has emerged over the years, and clearly underlie any possible future changes. First, the CFA has not and probably never will be able to mount a strike. The complexity and diversity within the unit compounded by the geographical realities make the option of a strike a virtual impossibility. Therefore, the CFA recognized early on that given the nature of public sector bargaining in California, and the unlikelihood of mounting an effective strike, the union must rely on its political influence to impact the bargaining process. Second, in the decade since it became the bargaining agent, the CFA has developed a powerful lobbying effort at the state capitol in Sacramento and has its own PAC fund which, when combined with the PACs of its affiliates, creates a powerful presence in California politics. Indeed, it is widely recognized that the CFA generally has more influence, independent of its affiliates CTA and SEIU, in the state legislature than have the Chancellor and his staff. While the CFA is not in a position to necessarily get what it wants, the union has a virtual veto over anything the Chancellor may want.

The 1980s, when collective bargaining became a reality for the CSU, may not have been ideal economically, but now look very much like the golden years. Campuses expanded, enrollment grew, and the faculty received regular cost-of-living raises, as well as step increases on the salary schedule. In 1990, the bottom fell out for California as the state's economy collapsed and tax revenues fell. The lack of adequate reserves meant the state's budget had to be cut, with a devastating impact upon higher education. Student fees (in reality tuition) have risen dramatically in a state that once promised access to affordable higher education to any citizen that could benefit from such an education. In the CSU, 5,000 temporary faculty have been let go, course offerings have been dramatically reduced, and at CSU, Chico one tenured faculty member was laid off due to "program discontinuance."

At San Diego State University, the President sent layoff notices to 150 tenured and tenure-track faculty, many with 25 years or more of service. He proposed to discontinue, or dramatically reduce, the departments of German, Russian, Sociology, Anthropology, and Chemistry. Those remaining in the Chemistry Department, for example, would have been all white males over the age of 60, with more than 25 years of service. This action represented the most serious single threat to the CFA since its certification in 1983. However, a concerted action program, on numerous fronts simultaneously, managed to reverse the decision. The CFA mounted a major public relations campaign in the state legislature, focussed upon why San Diego State was the only campus responding to the fiscal crisis so dramatically. The chapter mobilized the faculty quite effectively in the middle of the summer recess and CFA's national affiliates, the AAUP and the NEA, came with staff, monetary support, budget analysis, and an AAUP review for potential censorship. One interesting longterm outcome of this crisis has been the passage of legislation to require CSU campuses to begin keeping their budgets by national standards; the system must also begin a process of regular audits.

Following the San Diego fiasco and the continuing fiscal crises in California, a major question began to arise for both the CSU and the CFA: How could the parties best respond to the intense fiscal and political stresses? Given the rocky relationship and the bargaining history, to change the nature of the relationship would take a major change in attitude. Yet, both parties recognized that the external crises were overwhelming the system. Together, the parties responded to legislative pressure to delay implementation of a negotiated decrease in teaching load (currently one course higher than at comparable institutions). Such action was not popular with unit members who failed to recognize the political climate which mandated such action and saw only the union "selling out."

The current contract was extended twice in order to avoid prolonged bargaining crises which would spill over into the state legislature, and finally, both parties after extensive investigation agreed to enter into "interest based bargaining." The Federal Mediation and Conciliation Service has trained both sides and has a staff person sitting as a facilitator to the process. This is an uneasy effort, at best, yet neither party really wishes to engage in the hostilities of the past given current realities. Neither the Chancellor, nor the CFA President, is sitting at the first negotiating table and both Boards (CSU and CFA) remain dubious. The two CSU Presidents on management's side, and the faculty members on the unions's side, suspect the process is a "sell out." The climate was not improved by a unilateral management decision, following the granting of the first across-the-board increase in over three years, to deny step increases to faculty who were promoted in the previous year.

The parties have also begun to engage in coordinated lobbying in the state legislature in an attempt to avoid misunderstandings. Through weekly meetings and discussions of positions, labor and management hope to present a "united front" to the legislature, whenever possible. Now, when there are disagreements, at least they are understood in advance. For example, the CSU is lobbying for a 24 percent increase in student fees while the CFA supports a 10 percent increase, but both are committed to one-third of any increase being set aside for student aid. The CFA has complained loudly in the legislature about the 9.6 percent salary increase given to eighteen of the campus presidents while 70 percent of the faculty received 3 percent and the remaining faculty also received a 4.9 percent step increase. The CFA's position is that CSU presidents' raises should be no greater than what the faculty receives.

Finally, both parties are working together on the Fort Ord Joint Labor-Management Committee which is developing the guidelines for the establishment of a new CSU campus at Monterey Bay. A unique Memorandum of Understanding has been signed establishing a special partnership in this venture and may be the first time ever such cooperation has existed to establish a new campus. From the union's perspective, such a partnership offers opportunities. Hopefully, it will lay the groundwork for a new approach to collective bargaining in the system and for resolving problems jointly. A successful outcome would demonstrate that partnership and mutual problem-solving is possible.

However, there are also great risks for the CFA in such a venture. If additional monies do not come from the federal government and the state for the new campus, the other campuses will suffer even greater losses. The faculty may blame the union for these loses. It is hard for the union to convince members that cooperative efforts are in their best interests. Great fear remains that the new campus, and talks of other "charter campuses," will be used to circumvent the contract; e.g., a recent plan has been discovered to "contract out" the MBA program to a private college.

Difficulties in cooperative efforts as outlined above are hard for both sides. Many administrators find it difficult to work with faculty "as equals." Radical faculty see the union as becoming a "management union." Nevertheless, the CFA has engaged on this course and is now proposing that the CSU engage in a partnership to promote the CSU and its role in the state's economy and its economic recovery.

In the final analysis, for such partnerships to succeed, a change in attitude by both parties is required to one of "mutual respect," where the mutual interests of both sides must be viewed as far more important than personalities or campus politics. Only time will tell whether these joint efforts will succeed and, in the interim, the union must continue to build its political power and its membership base in the face of harsher and harsher external realities for higher education in California's economy.

LEADERSHIP IN HARD TIMES

C. THE SITUATION OF HIGHER EDUCATION IN QUEBEC: SOME THOUGHTS ON THE CHALLENGES FACING THE ACADEMIC UNION MOVEMENT

Roch Denis, President
Fédération québécoise des professeures et
professeurs d'université
(Quebec Federation of University Professors)

At the conference in Berlin last September, I had the pleasure of discussing the situation of higher education in our various countries with several of you. From these discussions, I rapidly concluded that the problems and challenges currently facing universities transcend national barriers and are similar even in nations of diverse sizes.

The pleasant feelings I took away from Berlin yielded to anxiety, however, when Dr. Annunziato so kindly invited me to address this meeting, I wondered what useful contribution I could make to this conference, if all the problems universities face are the same.

Even now, I am not certain how enlightening my views will be, but I am convinced of the significance of the theme you have chosen, and I would like to present to you some wholly personal thoughts on the role of collective bargaining and of higher education unions in this period of major social, economic, and political transformations. These thoughts are based on my own experience, which is pretty well limited to the Quebec context. I do not in any way claim universal significance for them.

By way of introduction, to these reflections, I would like to outline the problems and challenges currently facing higher education in Quebec. The most prominent fact in the news, the one that currently commands the most attention in university circles, is beyond all doubt the extremely severe budget cuts recently imposed by the government on the province's twenty or so universities. Last year, they amounted to 50 million Canadian dollars. They are to be imposed at roughly the same level in 1994-1995. The cuts flow from the government's budgetary decisions and are among a series of draconian measures to be inflicted on universities for at least five consecutive years.

These are not the first cuts (not that that makes them any more acceptable). Numerous others made over the last 15 years have forced universities into chronic underfunding, and these latest cuts are literally pushing them into crisis. The notion I just used, that of chronic underfunding, has been invoked to describe the circumstances imposed on universities so far, but it is no longer adequate. Today, it is a question of state divestment from institutions. The implications of this latter phrase are similar to the critique implied by the notion of state withdrawal, which only makes real sense in a context of democratic and social gains under threat.

This is precisely the case of universities in Quebec. In Quebec society, as in many others, universities represent a public entitlement. The difference is that, for us, the entitlement was gained relatively recently. Quebec has only enjoyed a full university network for about 25 years. It was just 25 years ago that our first state university was founded. Called l'Université du Québec, it comprises constituent institutions in various cities of the province. This new network, complemented by the older universities (Laval, Montréal, and McGill in particular), gave rise to a true provincial university infrastructure. I mention this because the majority of universities in our province are no older than 25 years, and many of them have not even completed the first, necessary, stages in their growth cycle. And the budget cuts slow down, indeed check, just this growth and development, as well as undermining all universities' ability to adequately confront current teaching challenges.

Professors have recently become more aware of the seriousness of the situation, but they are not the only ones to worry. In recent months, university administrations have several times spoken out about the negative short- and long-term effects of government policy. The extent of the problems is so great, however, that all parties involved understand that the protests made to date are inadequate. What, then, is to be done? And how can professors and their unions act effectively in the face of this great challenge? I will come back to this question in a moment. The cuts are having multiple effects. I am only going to present the outlines, not a detailed portrait.

The first social impact of the cuts that are hitting universities is on access. By cutting funding, the government has shifted the burden to those seeking access, that is, students, who must now pay more in order to exercise what ought to be viewed as a right sponsored by society as a whole. Government at different levels -- like governments in other countries -- claims that this merely increases the student contribution to university funding. But doing so means that, increasingly, access to higher studies is not based on talent and ability. A financial barrier is erected at the point of entry. We sometimes hear it called a "user fee," as though user overindulgence in university education needed to be curbed.

This perspective is in fact being sold as truly up-to-date thinking, while in reality, driving thousands of young people away from the university represents a backwards trend to a not-so-long-ago time when access to higher learning and knowledge was only granted to a social elite. Yet on the whole, university administrations supported the federal and provincial governments on the matter of raising tuition fees, because they thought i%' ^R ((+' (would solve at least part of their own problems. Universities could not of course abandon all concern for access, that is, not without betraying their mission and role, especially in a society like ours, where specific cultural and national considerations mean that more is at stake in providing youth with a university education. The threat to access represented by the increase in tuition fees became so shatteringly clear that Quebec's former Minister of Education actually cited this concern herself when she recently announced that the increases would not be as high as originally planned. Let me add that she was fresh from witnessing student groups mobilize into a solid front against the increase. The nearness of an election date may have also inspired political wisdom.

The impact of public investment from universities is also seen in the growing gap between the number of regularly-employed professors and the number of students enrolled. We are already witnessing direct effects on the quality of training and supervision, yet the professor-student ratio continues to worsen. Universities are trying to combat the decline in conditions, but, do not have the means. They have responded by applying quotas for admission in more and more programs. What appears like an effective means of preserving quality is merely part of the fallout from the budget cuts.

The cuts also have the counterproductive result of pitting institutions against each other in competition for the student "clientele." Thus, whereas we should be working on bringing together our institutions, so they can act together without infringing institutional autonomy, the cuts are fostering practices far removed from academic values and educational requirements. Programs that the current economic climate makes into "drawing cards" are developed at the expense of less profitable programs. Programs are set up, not as the result of an academic investigation into the inherent requirements of university education, but because corporate financing is available for them. Fewer courses are offered; courses and programs that are not considered "cost effective" are dropped. These trends are not brand new, but they are taking on momentum. I know these scenarios are all-too familiar to the present audience.

One more point about this aspect of our current situation. A few years ago, the government decided to tie a certain portion of its funding to the number of graduates that universities "produce." Institutions are thus pushed to churn out graduates in order to get funds. To the extent that this approach fosters fewer courses for given diplomas or lowered program requirements, many people doubt that it is compatible with quality education. This is all the more true as universities see their resources and means shrink from year to year. Try to do more with less; try to do more for less.

I mentioned that the universities' financial crisis means they must rely on reduced teaching resources to handle increased needs. As a consequence, they are trying to meet huge teaching and support needs by designing cheap, insecure positions. They require young professors to insure their own positions by obtaining research grants. As a whole, this trend means that all professors are under pressure to work for their institution's financial survival by hunting out grants and sponsorships. The impact of these trends is felt not only in teaching, but in research itself.

One of the most striking recent illustrations of the current situation is supplied by efforts to adjust professors' workload. The adjustment would mean that professors engaged in funded research would be wholly or partly exempt from teaching responsibilities, while those not engaged in research -- that is, funded research -- would take on a heavier teaching load, almost as a penalty. They would assume the teaching load of exempted professors. This proposal was made in the name of flexibility and equity. Professors' unions took a stand against the implementation of this system in its most unacceptable and undemocratic forms. It is my belief that professors showed a lot of foresight, for the adjustment would have set in motion a trend that would soon result in shearing university teaching from university research entirely. It is our deep conviction that the teaching and research components of our responsibilities as professors must continue to exist in a close and dynamic relationship with each other. One enriches the other. Every professor must combine them in order to offer students an education of quality.

Adjustment is not the only issue, however. Professors are being assigned to postgraduate teaching exclusively, a trend that carries the same risks under a different guise. The idea here is that undergraduate teaching will be separated from master's and doctoral teaching, with one group of professors authorized to supervise graduate studies and the other not. One of the weightiest criteria for authorization would be success in obtaining research grants. This measure, too, has inevitably generated much controversy. If it became a widespread practice, it would have the same result as adjustment, namely splitting faculty into two distinct camps: the undergraduate-teachers, and the researcher-professors working at the graduate level.

The fact that the pressure to implement measures of this kind increases with budget cuts reveals that they are perceived as techniques for increasing productivity. The core of funded researchers, whose work becomes critical to the university's funding, is expected to yield higher productivity. This would occur, though, at a cost to undergraduate teaching. Even for research and researchers, these approaches to improving productivity represent a snare. How can university research flourish, if governments continue to slash budgets, if the institutions' internal funds grow ever more scarce, and if research, locked into a single pattern, is driven less and less by the concerns of the researchers and their institutions' missions, and more and more by external forces such as the criteria and priorities of corporations and governments?

The risks represented by these trends do not only threaten academic freedom, so necessary to the progress of research. The very institutional framework in which academic freedom is supposed to be exercised is being forced into a profound transformation.

Now, in Quebec, no one has yet threatened that the academic network will be dismantled. Possibly, the word "dismantle" sounds too alarmist. Yet, it is reasonable to ask what course universities are on when we see the progressive privatization of university funding gain momentum in reaction to public divestment. Indeed, we must ask the question, in order to develop an alternative to current trends. Is privatization on the agenda? The government is henceforth going to be allocating millions of dollars in public funds to organizations entirely independent of universities, rather than to universities themselves, to seed research projects in partnership with industry. In these research projects, academic researchers will become simply productive labor, leaving the control, design, and destiny of the project to others. Even as we witness these developments, we hear recommendations that institutions of higher learning be organized into a hierarchy. Each is to be assigned a certain status depending on whether it is given a mission for research and advanced study, or the (less grand?) responsibility of absorbing the menacing wave of working-class students advancing on undergraduate studies.

These proposals, it must be added, are inspired by an "American model," or so their proponents claim. But I should explain as well that it would be highly undesirable to graft the American model (if indeed that is what we are talking about) onto the Quebec reality. Quebec's academic network is not large enough to allow us to even consider such a "model" seriously, unless we are prepared to see research funds and study for advanced degrees concentrated in two or three institutions, while all regional institutions quietly suffocate. Neither academics nor the public affected would ever let this happen. We are pursuing a concept of the university that fits the objectives and needs of a democratic society, that provides new generations with better opportunities for access to knowledge, science, history, culture, and original work. Such opportunities will always be major contributors to equality, economic and social progress, and freedom. The transformation of universities into businesses does not strike us as a promising way to realize this concept of the university. I am certain that even though you operate in a different context from ours, our goals as academics are essentially the same.

I would like to present one more result of the budget cuts we are experiencing. They tend to suppress academic initiative and to increase centralization of institution operations. This trend is worrisome, because the academic context, one of teaching, research, and creativity, is inherently incompatible with bureaucratic sluggishness. The financial crisis is shifting the main focus of universities from academic to administrative and budgetary concerns. In the debate on resource use, academic members of the university community are losing ground. Whereas the debate should be conducted with the needs and objectives of the academic mission as the departure point, that mission is itself being redefined and realigned to fit financial imperatives. On university boards of directors, more seats are being filled by representatives from the socioeconomic sector and fewer seats by professors; and boards are acquiring a greater say in institutional orientations. The result is to exacerbate conflicts with faculty senates.

What role should unions and collective bargaining play in confronting these great changes and the imposing challenges they bring with them?

I must first respond that in my view professors' unions and professors themselves, as a professional group, have been very slow to formulate common views, and accordingly to plan action, in response to these problems. In fact, our aim in forming a unified labor federation in 1991 was to try to make up for lost time and develop a more effective collective voice. We still have much work to do, and are only just beginning concerted action.

We can see the effects of our slow start, in my view, in our very understanding of the academic union movement. It seems to me we have worked with a somewhat limited vision of collective bargaining, one that was preoccupied with our members' interests (which is of course a wholly appropriate concern) to the neglect of a focus on academic development and on the role of the university as an actor in society.

Even to discuss the protection of professors' interests as distinct from the protection and furtherance of the conditions in which the academic mission can be fulfilled, illustrates the problem I am talking about. In recent years, we have come to see that many of our most serious present and future problems, in particular those related to funding, flowed from recent trends. They did not fit the existing framework of collective bargaining, yet had an impact on professors' working conditions, on an ongoing redefinition of academic work, and, as an inevitable result, on the very conditions of students' learning. I will cite only one example here, that of the significant changes in the method of funding research described above.

As individuals and through our unions, we first tried to deal on a local level with new issues. This was altogether natural, but, in many cases, it made collective bargaining more difficult, and substantial advances occurred more rarely. The union movement seemed to be more a defender/protector of acquired rights rather than a contributor to new and tangible forms of progress. Naturally, unions lost some of their credibility and, indeed, legitimacy as bodies truly representative of professors, because their usefulness and effectiveness were obscured. Involvement and activism were perceptibly affected.

I would like, though, to provide a context for my suggestion that we had too limited a vision of collective bargaining and of the role of unions. I belong to a union that went on strike twice, in 1971 and in 1976. The first time, professors struck for three weeks, in defense of the quality of teaching. Quality was our watchword, because we

BEST COPY AVAILABLE

held the conviction that our actions as a union would have a decisive impact on quality. Thus, we acted on the presumption of an intimate relationship between the conditions we demanded for the practice of our profession and that profession's *raison d'etre*, to provide students with a quality education. In 1976, the professors' strike lasted four months. One of the major goals of the strike was to defend the Senate and other academic authorities within the institution; the administration wished to eviscerate these of all genuine power in favor of bureaucratic centralization. Here again, professors and their unions were acting on the direct connection between their professional practice and institutional working conditions that related to academic prerogatives and initiatives. Our colleagues at Laval University went on strike for an equivalent period of time in 1976, over the issue of academic freedom, among other concerns. They demanded recognition of academic freedom as a working condition and insisted it be specified in their collective agreement. They won.

Now these instances, drawn from the history of our union movement's beginnings, may seem to contradict my remarks above. But the fact is, I am not sure that over the past 15 years we have acted in harmony with the legacy embodied by those strikes. We turned inward, resting on the gains we had made, and settled down largely to collaborating with the administrations in the management of working conditions. This inward-looking approach is no longer viable in our present time of academic crisis. We need to get back in touch with our original orientations, but now more than ever, we must do so in a mode and a venue far more open to province-wide concerted action.

In short, I am pleading that we take comprehensive academic issues on board in our union and professional activities, and develop a keener awareness of the need for inter-union joint action capable of leading to province-wide action and campaigns. In my opinion, that is the only way we can be sure of defending academic interests effectively. We must not oppose our interests to the setbacks suffered by institutions, as though we failed to see the impact of those setbacks. We must instead demonstrate that our demands represent an essential element of the defense of the academic mission, currently under threat.

For this to happen, a certain condition must absolutely be met. The academic union movement, no doubt like other union movements, is too self-contained; to some extent, it exercises self-censorship and thereby reduces the impact and influence of its actions. Yet, now more than ever, it must prove that it truly constitutes the professors' representative body, rather than a wholly separate body that seeks to speak for them. To achieve this, academic unions must give professors themselves the floor and provide them with a venue in which to engage in free debate about their problems, reflect on their working conditions, and jointly define their shared perspectives. While it may not be obvious, all this requires a change in the way we view our role. Our present style of union activity generates certain kinds of sectarianism. Participants encounter points of view that resemble their own and the overall perspective is not subjected to self-critique. Recruitment is always from the ranks of the converted. The movement fears controversy and dreads professors going public with their internal differences. In my humble opinion, these are the reasons it is not developing as it should and does not hold the position it should. We should be multiplying opportunities for professors in various disciplines to debate the problems and issues they encounter in their work, in their teaching, in research. We should not do this only at times when we need to consult them about major negotiations and contract renewals.

Our union movement does not exist and evolve in isolation; its development cannot be assessed apart from the development of the union movement as a whole and of social movements in general. It is not my wish that these reflections should obscure that fact. In the current climate, however, which is certainly a difficult one, we simply cannot justify waiting passively for better days by pointing to the stresses and tensions currently affecting the union movement as a whole. We must act and react now within our own environment, the university. This is how we can best help strengthen our movement and further its social and democratic goals.

Only one point remains to be made. The conference in Berlin and the one you have organized here lead me to believe that the academic union movement is in urgent need of international fora in which to express itself and develop joint action. I sincerely hope, if we wish our respective national organizations to develop, that more work will be put into this. It would help us all enormously. May I say in closing, without any intent to flatter, that higher education unions of the United States are among the organizations best placed to further such international cooperation.

LEADERSHIP IN HARD TIMES

D. RECENT TRENDS IN COLLECTIVE BARGAINING IN CANADA

Donald C. Savage, Executive Director
Canadian Association of University Teachers

I intend to deal with four major trends in Canada in the last few years, namely financial pressures leading to cutbacks, quality assessment, the problem of fraud and misconduct in research, and confidentiality as a barrier to grievance and arbitration. Before I do that, however, I should say a word or two about the similarities and differences between collective bargaining for university faculty in Canada and the United States.

The structure of faculty collective bargaining in Canada is similar to that in the United States in the sense that it is very decentralized. This is quite unlike the more centralized faculty bargaining structures of France, Britain or Australia. In a certain sense Canadian collective bargaining is even more decentralized than in the United States, since there are no examples in Canada at the university level of bargaining for an entire system, as at the State University of New York. The closest model to SUNY in Canada is the system of the Université du Québec, but even here each campus has its own collective agreement. System bargaining, as at SUNY, can only by found in certain community college structures, notably in the province of Ontario.

There are, however, important differences. There is no distinction in Canada between public and private universities. Most Canadian universities are legally private, but publicly funded. A recent decision of the Supreme Court of Canada reinforced this status when it ruled, in connection with mandatory retirement, that universities were private institutions and were not covered by the Canadian Charter of Rights whose jurisdiction extended only to governmental actions. This has meant that wherever university faculty associations in Canada have sought certification as a bargaining unit, they have done so under the labor legislation governing the private sector. The only exception is the military colleges. Opting for the private sector was a conscious choice by CAUT when certification began in earnest in the 1970s, since bargaining in this sector had many fewer restrictions than in the public sector. Essentially, in the private sector in Canada anything can be bargained, although it always takes two to tango, of course. There is also no structure of mandatory, permissive, and obligatory issues in bargaining. This has meant that Canadian collective agreements have become very extensive documents, and it has certainly been the position of CAUT that anything that might reasonably be considered contractual in the widest sense should be included in the collective agreement. For example, virtually all collective agreements outside of Quebec have extensive financial exigency and redundancy articles -- a matter to which I shall return later.

Finally, many more university faculty are covered by collective agreements in Canada than in the United States. It is a little hard to count, because there are several different varieties of formal collective bargaining. About half the university faculty in Canada are covered by collective agreements under provincial labor codes. In addition, in the province of Alberta the government passed special legislation which gave the local university faculty associations legal bargaining rights, but without the right to strike. In a few large and conservative institutions, such as the University of British Columbia, the faculty association has, in effect, negotiated a recognition agreement and a contract according to private contract law rather than labor law. As an historian, I am interested in the attempt to recreate a form of collective bargaining that existed in Canada before the rise of modern labor law, but as a trade unionist I doubt that such contracts will be as durable as a collective agreement negotiated under provincial labor codes.

Between 1970 and the late 1980s, the momentum in collective bargaining in Canada was with the faculty unions. The local associations had provided the dynamism to certify and to secure initial contracts. CAUT had provided support through its collective bargaining committee. It had also articulated model articles for bargaining purposes which had been widely used with local adaptations and had provided extensive legal advice in English Canada on the administration of grievances and arbitrations. Not even the financial turbulence of the early eighties pushed this process off course.

However, there have been some significant changes in the last few years, prompted in part by the severe recession that Canada has been suffering everywhere, except in British Columbia, and in part by the ongoing Reaganite economic philosophy which has taken over most of the debate on government finances. In Canada, it does not much matter whether you elect a conservative or a social democratic (New Democratic Party) provincial government. You still get the Canadian equivalent of Margaret Thatcher. In this Canada is simply replicating the experience of New Zealand and Australia under Labor governments.

Provincial governments over the past few years have cut their overall budgets significantly and have reduced the importance of education as a percentage of their overall budgeting. This has been done in a variety of different ways. In some provinces, such as Alberta, the government, which is Conservative, imposed drastic cuts on the universities, but left it more or less up to them to decide how the cuts would be distributed. The administration of the University of Alberta responded by demanding a significant salary cut and by proposing the abolition of certain programs, such as dentistry. The question is still under negotiation. If the parties at Alberta fail to come to agreement on salaries, they then proceed to binding final offer arbitration. The social democratic (NDP) government in Saskatchewan followed the same pattern as in Tory Alberta, but the overall cuts to university budgets were less severe. In Ontario, the social democratic (NDP) government passed special legislation which abrogated the bargaining process and put in its place a system of phoney forced bargaining which had to arrive at results predetermined and prejudged by the government. In Nova Scotia, the government imposed a two year wage freeze on all public servants, including university professors, even though they are not public servants. A similar wage freeze was imposed in Newfoundland.

One of the few provinces to escape an attack of this kind was New Brunswick. When the provincial government proposed a general wage freeze, the faculty association at the University of New Brunswick, which is a certified bargaining agent as are all the other faculty associations in the province, persuaded its colleagues elsewhere in the province and its administration to lobby the government to exclude the universities on the grounds that this was an invasion of university autonomy. The price was a promise by the local faculty associations to accept a voluntary zero salary settlement. The government accepted this arrangement. The faculty at the University of New Brunswick then negotiated a multi-year collective agreement which included salary increases in the latter years. The agreement also bound the university to use some of the money saved to increase the number of tenure track positions, a decision which eased the workload situation at the university and gave an opportunity to some younger persons to secure university jobs. When in a subsequent academic year, the government responded by putting additional pressure on the university's budget by controlling fee increases, the faculty and the administration concluded an agreement which postponed the increases for a few months which, in turn, allowed the university to operate within its budget but still eventually pay the increases. This is a good example of how faculty unions and administrations, who may well fight each other vigorously at the bargaining table, but who nevertheless trust each other, can combine when faced with political adversity to finesse a collective agreement and can, as well, lobby the government for common ends.

In Ontario, the effect of the negotiations imposed by the provincial government varied considerably. Some faculty associations were able to meet the province's financial objectives by utilizing pension surpluses or by finding the money elsewhere. Others were not so fortunate and will take the full rigor of the cuts through a series of payless holidays over three years.

The financial crisis has in turn led to a focus on what happens if a university actually runs out of money. As noted above, most certified bargaining agents in Canada included in their collective agreements articles on financial exigency and redundancy. In this the CAUT differed from the British AUT. CAUT made the decision in 1970 that it was politically impossible to argue for a total ban on lay-offs. CAUT thought that such a stand would simply provoke legislation as it did in the United Kingdom. In any event, such an article would only be for the life of a collective agreement; it hardly, therefore, seemed worth fighting over a principle which we were sure it would be impossible to secure in the political arena. As a consequence, CAUT advocated financial exigency articles which allowed lay-offs, but only after an independent commission had verified the books and only through an agreed and fairly elaborate procedure which guaranteed fairness through the grievance and arbitration procedure. This approach ensured that the article would only be invoked for a genuinely serious exigency and not each year when the university forecasts went a bit astray. It also meant that financial exigency would not become a backdoor way of firing unpopular faculty since the procedures were just as tough as those produced by a serious an ongoing decline in student numbers in a particular program, the model article proposed no lay-offs but rather redeployment.

There have been a number of confrontations in English Canada around this issue. Two among certified bargaining agents are important. The first occurred at Mount Allison University in New Brunswick. The President declared that there was a financial exigency of sufficient gravity to warrant lay-offs. The collective agreement, not one of the strongest in Canada by a long shot, nevertheless, required the creation of a joint committee of the union and the management chaired by a nominee of the senate to examine the books. That committee unanimously agreed that while there was a financial problem, there was no need to lay off faculty, because the budgetary difficulties could be met by other means over the next three years. The committee then specified how this might be done. That report was only advisory to the board, not binding as CAUT suggests, but when the faculty and then the senate voted for the report in overwhelming majorities, the President backed off.

The second confrontation occurred in the last few months at Dalhousie University in Nova Scotia. The President appointed a budgetary committee which reported to him that there was a financial crisis. He then announced that he would recommend the closure of a variety of departments, particularly in the fine arts. He completely ignored the financial exigency article of the collective agreement and said that this was a matter of program redundancy. The union took the administration to arbitration on the issue. The administration tried to sidetrack the arbitration by arguing that it could not proceed because no action had actually been taken. The arbitrator rejected this position. If he had not, it would have meant that university administrations could announce an impending closure, hold off while student numbers fell, and then argue that there was not the clientele to warrant the continuation of the department. The arbitrator then held for the union on the main issue. In his judgment he stated that, while a university decision may have a number of motives, there is usually an overriding one, and in this case the President had made it clear that money was the overriding explanation. As a consequence, the university had to follow the financial exigency article of the collective agreement. It had not done this and its actions, therefore, were nullified.

There have also been three important confrontations in non-certified, but major institutions, namely McGill University, the University of Toronto, and the University of Western Ontario. The first was at McGill and involved the attempt of the administration to close the faculty of dentistry. The university, in fact, decided to do so, but a counterattack by the faculty with a well orchestrated lobby to secure public support persuaded McGill to change its mind.

At Toronto, the administration some years ago failed in an attempt to close the faculty of architecture in circumstances not unlike that which developed at McGill over dentistry. This last year, however, the administration successfully closed the undergraduate program in forestry. It nevertheless kept the graduate program and as a consequence was able to guarantee that the contracts of all tenured professors would be honored. In the course of this confrontation, the administration articulated a position by which it would try to limit the faculty association only to negotiations on salaries and employee benefits and to replace it everywhere else, including in the area of exigency and redundancy, by the internal academic and administrative structures of the university. It is, of course, easier for an administration to do this by fiat in an uncertified university. However, at Toronto this power is limited because the association, in fact, has an agreement with the administration on the procedures for renewal, tenure and dismissal which can only be breached by the administration either by mutual agreement or by repudiating the entire document. There is no doubt that repudiation would lead to instant certification.

At the University of Western Ontario, the administration took the same line as at Toronto. It tried to close the graduate school of journalism by trading it to Carleton University which has a largely undergraduate journalism program. Like Toronto, it also guaranteed the position of tenured professors. It, too, attempted to shut out the faculty association and CAUT from the process and to put the closure through the internal university academic and board procedures. Ironically, the administration succeeded with the senate, but failed at the board of governors because of intensive lobbying by the school and by the faculty association. New persons are taking over the top administration at the University this coming year, and it remains to be seen whether or not they will wish to continue the policy of confrontation with the faculty association and with CAUT.

These developments suggest a pattern. It is certainly easier to resist the closure of a professional school, because that school can usually muster an impressive defense from the profession itself. My fear is that universities will, therefore, focus on more vulnerable programs, particularly those in the fine arts and in the humanities. It is significant that the University of Waterloo moved against its dance program, and Dalhousie tried to attack several programs in the fine arts. Such an approach lends itself to the frequently anti-intellectual and anti-arts milieu of the politicians and the talk show hosts. There will also undoubtedly be pressures to roll back some of the curriculum changes of the last thirty years in the name of back to basics.

The enthusiasm of some university presidents to use the senate as a counterpoise to the faculty union is certain to provoke an ongoing debate in many parts of the country.

Finally, if it does not matter who one elects as politicians since they all adopt the same policies, this will surely put a premium on the ingenuity of local negotiators to construct defenses for the university. I am certain that these defenses will be more secure, if they are part of collective agreements.

These developments also suggest the need for changes in university governance. Prior to most of these attempted closures, CAUT had already taken an interest in senate reform through the appointment of an independent study group on university governance. Their report recommended a thorough-going reform of senates including the drastic reduction of the voting powers of the administration. As administrations in Canada have grown in size, they have tended to take up ever more ex officio seats on the senate. One does not have to have a majority to control an assembly -- about a quarter to a third of the seats will do -- especially if the administrative party is well organized and uses the tools of political patronage effectively. I do not doubt that senates have a roll to play in academic planning, including terminations of programs, but I would not place much confidence in them unless they are reformed.

Some Canadian university administrations see the recession as an opportunity to reassert managerial power in the university. Some of our more innocent members assumed that this administrative approach would be restricted to the financial arena. But, of course, the real issue in these circumstances is power, not money, and it will focus on the desire of the senior administration to manage the academic enterprise from the top. I think it is guaranteed that such an approach will breed bad blood and will be as unsuccessful as the founder of TQM predicted for that type of management style. Those that follow the model of the University of New Brunswick will more likely end up with more effective and long-lasting arrangements with their faculty.

There are, of course, other consequences of the financial crisis with which I do not have time to deal today. Some will be familiar to you. Universities are tempted to use even more part-time faculty and to pay them as little as possible. It becomes more and more difficult to improve the number of women employed as faculty when there are fewer and fewer positions to offer. The whole social service fabric of the university, particularly in student services, is under stress; so, too, are central academic services such as the library.

Departments are tempted to impose unrealistic standards on new employees, demanding ever-increasing research input and ever more attention to undergraduate teaching.

The second issue with which I would like to deal briefly is that of quality assessment. Canada, like most other industrial countries, is debating this issue. Many Canadian universities have faculty development programs which regrettably rarely involve the faculty association, although one of the first, that at the University of Western Ontario, was set up originally by the faculty. However, the current matter of debate is the question of performance indicators. Since we are coming into this discussion somewhat behind the United States and Britain, we should be able to avoid the follies that are associated with this approach to management. I am not, however, too optimistic. My own belief is that any performance indicators, at least insofar as they deal with faculty, should be negotiated as part of the collective agreement. CAUT is working with its counterpart in Australia to develop what we hope will be a tripartite research program in this area involving our two countries and the United Kingdom.

The third issue I would like to address is fraud and misconduct in scientific research in the universities. This has burst on the public scene in Canada with the scandal over research on breast cancer. A major research project was funded by the American government and centered at the University of Pittsburgh, but some of the work took place in Canada. As you undoubtedly have read, the research at the Hopital St. Luc in Montreal was compromised by false reporting. This event has received wide publicity across the country.

There is another factor at work, as well. There is an ever-increasing pressure on the university and its faculty to secure an ever-diminishing number of research grants and to produce money-making research. This, of course, fits in with the views of the Reaganite politicians who lead most Canadian provincial administrations. The pressure to be entrepreneurial can lead, not only to the trivialization of research, but also to the cutting of corners and to other sharp practices. There is currently a major inquiry into such allegations at Concordia University in Montreal which will be releasing its report shortly. This situation and the enormous publicity concerning the Hopital St. Luc in Montreal has made the question of fraud and misconduct a matter of intense discussion and high priority in Canada.

Several years ago, CAUT recognized the importance of both ensuring the integrity of scientific research and at the same time making certain that those accused were treated fairly. CAUT developed an extensive background paper on the subject, and adopted both a policy statement and a model article for insertion in collective agreements. Since research is a contractual obligation of university faculty, CAUT believes that procedures relating to the way in which that research will be judged, whether positively or negatively, should be negotiated as part of the collective agreement including any definition of scientific fraud. A number of faculty associations, including the University of New Brunswick, Memorial University of Newfoundland, and Wilfrid Laurier University, have negotiated such articles in their collective agreements. CAUT's approach fits in with the policies adopted by the Medical Research Council of Canada which requires universities to adopt effective procedures at the local level and to accept responsibility for investigating fraud.

The focus on fraud can also lead to tragic results. Last week a neurologist at McGill University and her husband committed suicide after the Montreal Gazette printed a story alleging research fraud. She had been reprimanded by the university for extending her research to a larger group of individuals than she had been approved by the university ethics committee, albeit with the informed consent of these subjects. She believed this to be a reasonable extension of the approved experiment. The results had been approved for publication in Science. Someone sent an anonymous letter to the university and to the newspaper charging her with fraud. Both the Dean of Medicine and the Director of the Neurological Institute said that none of the facts suggested scientific fraud, but the Gazette published its story anyway. The professor's lawyer said:

> "There are serious questions that I hope will be asked about what constitutes news and what doesn't constitute news...There is a feeding frenzy now on research fraud. But does that really mean that there was a story here?"[1]

Finally, a word on the contentious issue of confidentiality as a barrier to the grievance and arbitration process. CAUT has for some time taken the view that all materials, including letters of reference with their authorship, should be available to both sides in any arbitral process. Without all the information, it is impossible to know for sure whether or not a department has stacked an evaluation by choosing only referees known to be hostile to the candidate or has engaged in other unfair practices. A series of arbitrations in Ontario, Newfoundland, and Saskatchewan have taken this position with increasing force. It seems likely that it is only a matter of time before this becomes the rule rather than the exception in Canada.

These are difficult and challenging times for Canadian faculty. I believe that the process of collective bargaining can be adapted and used by the faculty to address many of these problems. I have always thought of it as a process of true collegiality, one where equals meet at the bargaining table, as compared with the situation where administrators consult and, if they wish, ignore the advice they receive, or alternatively, make proposals and then participate directly in the decision-making on them. To me, this is a classic case of sitting on both sides of the bargaining table[2]. I hope that both unions and administrators in Canada will see the merits of negotiating solutions to these vexing problems and that the results will be saner and more long-lasting than any other approach.

ENDNOTES

1. *Ottawa Citizen*, 14 April 1994.

2. In another context, namely that of the granting of tenure, a Nova Scotia court nullified a negative decision of Mount St. Vincent University because the President and participated in the formulation of the original negative recommendation and then had sat as the judge to hear the appeal.

IV. ROLES, REWARDS, AND RESPONSIBILITIES

A. Patterns of Professional Evaluation and Assigned Duties in Faculty Collective Bargaining Agreements

B. Faculty Roles and Rewards in the Context of Accountability

C. Collective Bargaining and Technology

D. Lesbian and Gay Campus Organizing for Domestic Partner Benefits

E. Making It Work: Scholarship, Employment and Power in the Academy

F. Workers/Teachers/Students: Graduate Student Employee Collective Bargaining at the University of Michigan

ROLES, REWARDS, AND RESPONSIBILITIES

A. PATTERNS OF PROFESSIONAL EVALUATION AND ASSIGNED DUTIES IN FACULTY COLLECTIVE BARGAINING AGREEMENTS

Ernst Benjamin, General Secretary
American Association of University Professors

Many policy-makers advocate reallocation of faculty work-time and priorities from research to teaching. These advocates often complain of faculty resistance to this reallocation. Few discuss the role of collective bargaining, though some administrators include faculty unions among the alleged obstacles to reform. More often, proponents of changed faculty responsibilities simply claim that faculty "rewards" and faculty work are inconsistent with institutional mission regardless of bargaining. Specifically, reformers claim that faculty devote inadequate time to teaching due to the tendency of institutions to over reward research in relation to institutional mission. Many also complain that faculty resist administrative efforts to right the balance between teaching and research.

These claims find a receptive audience. Much of the public, most policy-makers, and many faculty share the concern that four year universities and colleges have adopted "publish or perish" as the foundation for faculty evaluation. Those faculty who feel victimized by such practices do in some cases assign responsibility to their colleagues as well as the administration. Yet, it is by no means empirically evident that teaching is under-valued relative to institutional mission or that faculty are unreceptive to adopting evaluation standards appropriate to institutional mission.

Collective bargaining agreements provide a good basis for an empirical assessment of these issues. Bargaining agreements generally state faculty duties, evaluation criteria and priorities. The statements are often more precise than the policies of comparable non-bargaining institutions. Moreover, since the statements are bargained, they reflect faculty ratification, though not necessarily faculty desires, more assuredly than the policies of non-bargaining institutions. Accordingly, an examination of collective agreements will provide concrete evidence of faculty attitudes as well as varying institutional practices.

First, however, it is important to recognize that there is abundant, if often overlooked evidence that faculty duties and expectations do broadly correspond to institutional missions. It is well established that faculty teach more contact hours in predominantly teaching institutions such as liberal arts colleges and comprehensive universities and fewer contact hours in doctoral and research universities. Almost two-thirds of faculty evaluation preferences correspond closely to institutional mission; that is, on average, only research institution faculty prefer promotion evaluation based on research. Within institutions, faculty typically teach more hours in service departments and disciplines with less funded research. Four-year and comprehensive institutions devote a substantially larger fraction of their expenditures to teaching, and substantially less to research than doctoral and research universities (For fuller discussion and sources of these findings, see "The Work of Faculty: Expectations, Priorities and Rewards," *Academe*, January-February 1994, pp.35-48).

This is not to deny that research-oriented faculty benefit in pay and prestige compared to teaching-oriented faculty. James S. Fairweather of Penn State University has shown that the greater the proportion of time faculty spent on teaching, the lower their salaries, both within and among institutions. (Fairweather, *Change*, July-August 1993, pp.44-7). This follows from the fact that faculty who do research as well as teaching spend a lesser proportion of their time teaching and, given that only a minority of qualified instructional faculty are qualified research oriented faculty, the logic of the market would bring them higher salaries even if teaching and research were equally valued.

Nonetheless, teaching remains the common denominator of faculty activity. Few of the academics who engage primarily in research have faculty status. All types of faculty, including those at research universities, average a greater proportion of their time on teaching that research. Moreover as, Table I shows, only 18 percent of faculty teach full-time at the research universities where faculty spend an average of 29 percent of their time on research; an additional 7 percent at doctoral institutions spend 24 percent of their time on research. The remaining three-quarters of faculty spend an average of less than 10 percent of their time on research and nearly two-thirds of their time on teaching. The work-time that full-time faculty do not spend on teaching and research is divided between administration (13 percent), professional development (5 percent), community service (5 percent), and other (7 percent).

The research ideal does not predominantly shape the distribution of faculty time. It does however, have some effect on faculty time and, among those faculty who do research, a possibly greater effect on faculty effort. These efforts do not derive simply from the idealization of research. They are incorporated in institutional work assignments and evaluation criteria. Many faculty find these institutional research demands excessive, especially in comprehensive universities and those aspiring research

TABLE I

**Proportion of Faculty Time Allocated to Teaching and Research
By Type of Faculty and Institution**

Type of Institution	Number of Institutions	Number of Faculty	Full-Time Faculty	% of Time of F-T Faculty Teaching	% of Time of F-T Faculty Research	% of F-T Faculty of All Faculty By Type Institution
All	3159	825000	514000	56	16	62
Four-Year	1370	537000	377000	--	--	46
--Research	104	193000	148000	42	29	18
--Doctoral	109	82000	56000	44	24	7
--Comprehensive and Liberal Arts	1157	262000	172000	62	10	21
Other	808	70000	45000	59	9	5
Public Two-Year	981	218000	93000	71	3	11

The data in the table are drawn from the NCES 1988 National Survey of Postsecondary Faculty The institutional and faculty distributions are from the institutional survey report Institutional Policies and Practices Regarding Faculty in Higher Education, January 1990, p 9 The time allocations are based on the faculty survey report Profiles of Faculty in Higher Education Institutions, 1988, August, 1991, p 55; the four-year time allocations are estimated averages based on combining the public and private catagories and the comprehensive and liberal arts catagories to correspond to the institutional data institutions that have greater teaching loads and fewer research opportunities than well-established research universities (Peter J. Gray, et. al., "A National Study of Research Universities: On the Balance Between Research and Undergraduate Teaching," Center for Instructional Development, Syracuse University, March 1992, p. 10).

It is precisely these universities in which four-year faculty most often seek collective bargaining. Hence, faculty bargaining offers a practical test of how the research ideal and institutional priorities are integrated when faculty have a substantial role in defining policies and expectations. The remainder of this paper presents reflections based on a review of workload and evaluation clauses in more than 30 faculty bargaining agreements at a wide range of institutions which have had AAUP representation.

It is only a modest exaggeration to begin with the observation that the smaller the size of the faculty, the longer the workload provision. Detailed workload provisions focus on classroom hours and equivalencies. They sometimes include specification of office hours, advising hours and other required events or services. Less detailed provisions state maximum or expected teaching loads and provide the basis or procedure for equivalencies. The least detailed provisions either affirm past practice and individual equity or refer to prior policies such as board or senate documents. Since detailed definition is based on teaching hours, detailed contracts occur most often where teaching is the principal faculty obligation. Where faculty responsibilities are more diverse and more varied among academic units, contracts rely more on past practice either to establish equivalencies or simply to give continuing effect to complex practices.

Consequently, if there is evidence of rigidity, it is not in resistance to instructional responsibilities but in their detailed enforcement in teaching institutions. The detailed workload provisions of many small and medium sized, independent institutions may run three to ten single spaced pages (Curry, Emerson, Marymount, Monmouth, Niagara, Regis, Rider, Wilberforce) and are difficult to summarize briefly. These agreements usually require 24 semester hours per academic year and often limit preparations to three per term. Other common provisions include: teaching assignment procedures and teaching expectations; overload policies and payments; both specific equivalencies and approval of equivalency procedures for labs, independent study and other special teaching situations; grading and examination policies; class size policies; and so forth. Research is not generally a basis for release time, but the Regis and Niagara agreements authorize the academic administration to reduce loads for research.

As in the fable about Eskimo words for ice, faculty and administration define teaching loads with a precision that reflects their preoccupation. Detail does not, however, equal inflexibility. Rider has a detailed procedure to facilitate departmental innovative teaching projects. Several agreements offer release time for curricular innovation. Whether detailed agreements make for better teaching, I cannot say.

Certainly some small colleges including Bloomfield, Utica and Bard Colleges do cover the essentials with less than a page each. Bloomfield requires three courses per term and a bi-annual January instructional project. Utica includes a brief procedure for exceptions to its 24 semester hour per academic year requirement. Bard, the only "selective" college in the group, assigns 15-18 semester hours per academic year, ties would-be commuters to a minimum of four days on campus and references handbook equivalencies.

Although fewer public colleges and comprehensive university contracts define teaching load in detail, almost all specify 24 semester hours per academic year as the norm. Several, most notably Connecticut State, but to some extent also Delaware State, Lincoln and Northern Michigan Universities, have provisions comparable to the more detailed college contracts. Others (California State, Eastern Michigan, the University of Nebraska -- Omaha) establish the basic teaching load and equivalencies more briefly. Oakland University, with a pattern and brevity more characteristic of research universities, establishes a broad range of "professional responsibilities" and repudiates specific hourly workload requirements of limits.

Comprehensive university agreements do frequently broaden the range of faculty responsibilities in their workload articles. This does not necessarily mean less rigor in maintaining the basic 24 hour teaching load against the pressure for research time. Two, Delaware State and Lincoln Universities, which do explicitly distinguish teaching load from the broader array of scholarly responsibilities, do not include research as a basis for release-time from instruction though Delaware State does make an allowance for graduate instruction and Lincoln for externally funded release time. Three others, though acknowledging departmental teaching variations (Central State) and a variety of teaching and program equivalencies (Eastern and Northern Michigan), make no express provision for research time. The few agreements that provide for research as an offset to teaching hours either empower the administration to allocate specific reductions or equivalencies (California State, University of Nebraska -- Omaha) or provide procedures for the allocation of specified quantities of release time (Connecticut State).

Three large independent doctoral-granting universities in my sample (Adelphi, Hofstra, and St. Johns) and one large, independent technical college (New York Institute of Technology) have lengthy workload articles with the substantial and specific teaching obligations more characteristic of small independent institutions than research universities. St. Johns and NYIT establish 24 teaching hours as the norm, and, though St. Johns notes the importance of research, provide no research release time. Hofstra establishes a 24 hour norm and provides a procedure for awarding limited number of "grants" of research release time. Adelphi specifies the 18-hour load more characteristic of aspiring research universities.

The workload articles of the public doctoral and research universities in my sample rarely exceed a page and almost as

83

rarely specify precise teaching loads. The University of Delaware, Temple and Western Michigan Universities establish 24 hour maximum loads. Delaware refers to past practice for actual loads. Temple applies the maximum to those engaged "only in teaching and minimal service;" actual loads are set by the dean "shall be reasonable and fair," and consider research. Western provides for administratively allocated reductions for research. The others (including the Universities of Cincinnati, Connecticut, New Hampshire and Rhode Island, and Kent State, Portland State, Rutgers and Wayne State Universities) do not specify teaching loads. Rhode Island notes the diversity of departments, the need for flexibility in fulfilling professional responsibilities, and the need to consider "teaching, research, and ...service." New Hampshire is similar but adds that the chair assigns individual loads with approval of the dean. Connecticut and Kent State reference established policy. Rutgers references departmental past practice as a standard for individuals. Wayne State combines references to fairness and prevailing practice with an academic appeal and grievance procedure.

The emphasis on teaching relative to research varies with institutional mission in negotiated evaluation policies as it does in workload policies. Few institutions, however, are as uncompromising in the exclusivity or priority assigned teaching in their tenure and promotion evaluation policies as they are in their workload policies. (I have not surveyed salary evaluation policies because few collective agreements outside research universities provide selective salary evaluation). This is not due to lack of emphasis on teaching in teaching institutions; many of these contracts contain highly detailed teaching evaluation procedures. Rather it is due to the tendency even of some predominantly teaching oriented institutions to require evidence of research activity.

The most teaching oriented evaluation policies in the sample include Bloomfield, Curry, Utica, Wilberforce and Regis. Curry insists upon effective teaching, academic preparation, and availability to students; it also considers scholarly activities and college service. Bloomfield requires "outstanding" teaching effectiveness and satisfactory ratings in professional preparation, professional attitude and growth (ranging from publication to attendance at professional meetings), and college service. Utica expects "exceptional ability and interest in teaching," evidence of creative professional activity and service; "publication is desirable but not absolutely necessary." Wilberforce assesses teaching effectiveness, professional achievement and service, but assigns "greatest weight" to teaching effectiveness. Regis explicitly integrates workload and evaluation expectations. It limits routine evaluation to teaching, teaching related and service activities and provides that "since Regis college is primarily a teaching institution, research is encouraged but not formally required of any faculty member." But, it also provides modest release time for research for those seeking promotion to full professor via a research option.

The remainder of those independent institutions in the sample that include evaluation clauses in their agreements both include research and do not assign teaching priority over research in evaluation. Monmouth evaluates teaching effectiveness, scholarship and service; promotion to associate professor requires "professional growth and accomplishments beyond the terminal degree." Niagara associate professors must offer "a high degree of proficiency as a teacher" and a record of "substantial scholarly research" or its equivalent. The eight criteria at Emerson include four requirements: appropriate degree, "outstanding teaching," "service to the college," and "research/publication." The criteria for associate professors at NYIT include "superior teaching performance and demonstrated academic and professional achievement." Rider expects "effective teaching," department and college service, and that candidates "demonstrate a scholarly record appropriate to the rank sought." At Adelphi, teaching and research are primary and publication is the clearest evidence of scholarship.

Although these agreements generally include creative activity as an alternative to publication in appropriate disciplines, few reflect the broad view of scholarship advocated by Ernie Boyer (Scholarship Reconsidered, The Carnegie Foundation for the Advancement of Teaching, 1990) and other reformers. Most explicitly require research and publication, not simply scholarship. Yet virtually all but Adelphi have standard four course per term loads and most have specific teaching evaluation procedures. These agreements do not substitute research for teaching. They add the demand for research to substantial teaching loads.

Those public comprehensive universities that define evaluation criteria in their collective agreements tend also to give greater weight to research in their evaluation criteria than in assigning or crediting workload. In some instances, however, they do emphasize teaching. Northern Michigan included "professional development" (research, scholarship, publication, etc.) along with "assigned professional responsibilities" (teaching) among its "judgmental criteria." Teaching is "primary and most important;" the weight of research and service may vary departmentally. Delaware State's "judgmental criteria" establish that "competence in teaching is an absolute necessity" and given greater weight than "professional recognition." Nonetheless, both evaluate research for tenure and promotion though neither credits research as part of workload.

Two comprehensive universities that offer some workload recognition of research also deal more delicately with the teaching and research balance in evaluation. Western Michigan requires "professional competence" (teaching) and "professional recognition" (including publications, scholarly papers and projects, creative activity, consulting and disciplinary services). But "outstanding teaching" or competent teaching and outstanding recognition suffice for promotion short of full professor. Connecticut State University gives priority and "greater weight" to "load credit activity" which includes teaching and specifically allocated research time. "Creative activity appropriate to one's field, such as delivering papers at professional conferences, production/performance of artistic works, research, study and publication" receives second priority--ahead of institutional service, professional service, and years in rank. The inclusion of "study" makes this possibly the broadest definition of scholarly activity in the sample.

Four other public institutions appear to give equal weight to teaching and research. Central State is Carnegie classified as a baccalaureate II institution and provides no research release time. It requires both "evidence of scholarship and research, particularly scholarly publication" and "those qualities of character, personality and competence expected in a teacher." Eastern Michigan expects "instructional effectiveness" (including expertise) and "scholarly and/or creative activity" manifest in contributions to one's discipline through original or applied research. The University of Rhode Island evaluates "excellence in teaching" and such evidence of accomplishments as publications and papers, funded and unfunded research, and creative artistic achievements. Wayne State University requires "excellence in teaching and in scholarly achievement" viewed "in the light of specific department/division, college and University considerations."

The remaining comprehensive (California State, Nebraska -- Omaha, and Oakland) and doctoral or research (Cincinnati, Connecticut, Kent State, Portland State, Rutgers and Temple) universities in the sample do not define evaluation criteria in their collective agreements. They refer instead to external documents. I believe that each of these institutions does evaluate both teaching and scholarship and that the research requirements are generally demanding. The absence of contractual specification serves to permit departmental flexibility, which many agreements also provide, and leaves the standards to definition through the ordinary procedures of academic administration and governance. The decision not to bargain evaluation criteria is evidence of the tendency of collective agreements to formalize, rather than refashion, pre-existing academic standards.

Even where agreements do specify as well as formalize workload and evaluation standards, the agreements clearly build on customary academic policies and do so with flexibility and, in some instances, imagination. Nothing in this survey suggests an unwillingness of faculty to negotiate workload agreements and the survey clearly shows that such agreements can vary widely in composition and specification. Many contracts offer detailed workload equivalencies to fit varied, and sometimes innovative, teaching assignments. Many permit departmental colleagues or chairs, flexibility in distributing departmental loads. Many contracts place great weight on teaching and teaching evaluation. Teaching evaluation procedures are often detailed and range from student evaluation to self-assessment to classroom visitation. Few agreements, however, define scholarship with the flexibility called for in recent reform proposals; the substitution of creative activities for research generally applies only to the creative and performing arts. Contracts could and should incorporate broader notions of scholarship and greater recognition of its relation to teaching, especially in teaching oriented institutions.

Since collective bargaining clearly manages many aspects of workload and evaluation flexibly, and soundly, it is not bargaining itself which can account for the lack of greater recognition of teaching and broadly defined scholarship. Serious scholarship, of whatever variety and however measured, requires time. Most contracts, especially in teaching institutions, measure time in teaching units. The prevalence of the 24 hour load and the limitations on release time in the college and comprehensive university contracts in this study suggest that bargaining has not led to an erosion of classroom contact hours compared to similar non-bargaining institutions. They also suggest that these agreements do not afford scholarship the time that they accord to its evaluation. Since research university agreements rarely define workload, they cannot be the source of such workload changes as may have occurred in research institutions.

Broadening the definition of scholarship will not increase the time for its accomplishment in teaching institutions. It could lessen the demand for publication in research universities but, if this is translated directly into increased teaching loads, it will mean merely more teaching and less research, not better teaching and wider scholarship. If broadening the definition of scholarship and lessening the pressure to publish is intended to improve undergraduate teaching, then teaching loads as well as evaluation need appropriate redefinition. Since the current climate of public policy hardly favors reductions or even stability in teaching loads, the prospects for genuine reform are limited.

Some primarily undergraduate institutions which have imposed substantial publication requirements in evaluation procedures, while maintaining 24 hour teaching loads, might well benefit from broadening the definition of scholarship, so that faculty scholarship could more closely relate to faculty teaching. Some research universities could take similar measures regarding those faculty primarily engaged in undergraduate instruction. Many institutions could benefit from distributing workload more flexibly among faculty and at different stages of faculty careers. Such flexibility exists in many current collective agreements and is not technically difficult to bargain. But flexibility is difficult to achieve as contrary pressures increase. The current contrary pressures, manifest in the agreements surveyed here, to emphasize teaching in workload policies and research in evaluation policies, are bound to make bargaining and reform difficult. Success will require more than good will. It will require honest recognition of the fact that combining teaching and scholarship well requires more time than doing either alone or both poorly.

ROLES, REWARDS, AND RESPONSIBILITIES

B. FACULTY ROLES AND REWARDS IN THE CONTEXT OF ACCOUNTABILITY

Lawrence Gold, Director
College and University Department
American Federation of Teachers

Let me start by saying that, in, my view, moving systematically to expand faculty roles and rewards would be good for faculty, good for students, good for research, good for service, good for education. But I would like to address the issue on another plane today, the political plane. In short, I think that negotiating a broader set of roles, expectations and rewards for faculty is an essential ingredient in responding to the most important political movement now affecting colleges and universities: the accountability movement, the movement to measure and assess what we do and accomplish in higher education.

The sources of the accountability movement are familiar to all of us. First is the funding crisis in the states, which has forced K-12 education, higher education, health, welfare, and corrections into an unhappy competition for scarce dollars. Because funding for these competing priorities is often mandated by law or the courts, higher education has not been coming up the winner in this competition. In fact, for the first time since World War II, we have lost state dollars in absolute terms over the last two years. Obviously, when dollars are scarce, accountability is bound to become a more salient issue.

Rising tuition is another factor. The growing distrust of all American institutions is certainly a factor. And then, there is all the negative publicity about higher education in particular -- the disputes over intercollegiate athletics; the accounting of research dollars; our problems about retention and dropouts; and the annual crop of articles about college graduates who are ill-prepared or who simply cannot get jobs. Finally we have the polemicists who are getting a whole lot of publicity saying false and mean-minded things about the professorate -- most to the effect that professors do not work very hard, and that they care much more about doing useless research than teaching their students.

Now I do not mean to overstate this. Higher education is still held in relatively high regard among the public and legislators compared to other institutions. But it is also true that more questions are being asked about us -- some good, some not so good -- and that the political system is generating some responses. We now have about ten states with mandates, some soft, some hard, about faculty teaching loads, with another six or seven considering similar propositions. The most recent law, in Ohio, mandates an across the board ten percent increase in classroom workload for faculty at all public institutions. Other states are developing a variety of standardized assessment mechanisms for college students and institutions.

And now we see the federal government, in what I consider a very important change, getting into this in a major way. In fact, I think we are seeing the beginning of a new era of direct federal involvement in institutional affairs.

The traditional stance of the federal government was that of non-involvement with the innards of higher education, coupled a concentration on access rather than quality. In general, the federal government relied on the states, and more particularly on private accrediting agencies, to deal with quality issues. As time went on, and student aid became a major dollar eater for the federal government, the U.S. Education Department became much more involved in institutional management of student aid funds. But that was about it.

In recent years, though, things have changed for a variety of reasons. We have seen the press and Congressional hearings shine a very harsh spotlight on fraud and abuse and educational fraud. At the same time, the federal deficit engendered greater scrutiny on all domestic spending programs. The result of all this, coupled with the negative publicity about academia I discussed earlier, is that Congress and the Administration are both saying they want to focus more on quality and outputs in higher education, as well as access. This obviously makes sense in some respects, although I have to be cynical and point out that one reason for officials to like this stance is that it does not cost a lot of money to focus on quality, while it would cost a whole lot of money to really deal with the access question.

The first concrete result of this new attitude was passage of higher education legislation in 1992 causing one accrediting agency to say, "There is a very significant body of opinion in higher education that says to the public, trust us and don't require us to produce any evidence of results. What we are saying is that those days are over. Institutions and faculty have got to demonstrate the good things that are happening to students."

This, I think, is only the beginning. The Education Department is reviewing the student aid programs right now, to see to what extent grades, other output measures and accountability ought to be built into the basic access system. Moreover, the National Goals Panel, a non-federal commission closely tied to the Administration, and the government's National Center for Educational Statistics are both talking about developing some kind of national assessment test for college students, either at the beginning, in the middle or at the end of their undergraduate studies, or all three.

All of this is quite a change, and, far from going away, I think the debate about accountability is just beginning. The only section of Secretary Reilly's State of Education speech delivered last February dealing with higher education was his call for a new public dialogue on accountability in colleges and universities. And the basic point is right. The public has a right to know that higher education institutions and faculty are working hard to serve the needs of the community, especially students needs, and that the investment in higher education is spent wisely. Leaders of the three faculty unions have been meeting this year, and will actually meet tomorrow just following this conference, to talk about how to engage that debate, even lead it.

But you can also be sure that the kind of mechanistic solutions to accountability that legislatures, governors and bureaucrats are prone to are not the right answer. Pretending that accountability is a matter of mandating more classroom hours is just that, pretending. As my colleague Ernie Benjamin says, it may lead to more teaching, but it certainly will not lead to better teaching. Developing a rote, a standardized test in the diverse world of higher education is just silly. Is there a test that can really capture what a student nurse, philosophy major and a junior officer should know at the end of their collegiate training? I do not think so. Mechanistic output measures like placement rates also obscure more than they reveal.

So what are we to do in the face of all this? Here is what I think. First, we in higher education must do a much better job of explaining to the public who we are and what we do, and we must make a concerted effort to get our message out. The public needs to know that higher education is more than classroom hours, that faculty work well over fifty hours per week on the average, and that teaching is both the preferred activity and the actual way of life of most faculty at most institutions.

We need to look at our own campuses and make sure all of our schools have processes in place, collegial processes, to really define the institutions's missions and goals -- not as pap, not as a set of "all things to all people" homilies, but so as to give a real sense of direction to the institution as a whole. For example, does the school aim to attract a particular cohort of students? Is there a particular philosophy or slant to the education it offers? What should a graduate of that institution know and be able to do? How does the institution relate to others in the state? Are there any special research or service roles for the institution.

Few institutions have a good process in place to think through the answers to these questions. To the extent they do, even fewer have communicated this thinking either to the publics they serve or even to their own workers. And fewer still could demonstrated that they have taken the next step, which is to systematically direct resources toward the ends they have set for themselves. Not to point fingers, but how often do legislatures ask administrators to account for how much of their time is devoted to the educational mission?

And then, I would maintain, if we had a better idea of what we were really trying to do, institution by institution, we would have a much easier time of defining for ourselves how we could and should be held accountable for achieving those goals. Accountability would not become a "one size fits all" proposition, but one in which institutions can show the public a set of goals and a process of assessing accountability that makes sense in terms of those goals.

When we think of making this kind of accountability structure operative, it seems to me that the academic department becomes a linchpin in the process. It is the place where the missions and goals of the institution intersect with, and are mediated with, the work that faculty actually do. And that brings us back to faculty roles and rewards.

We will not be able to translate goals into the day-to-day activities of each faculty member unless faculty are rewarded for excellence in furthering those goals. If avenues of advancement and resources are too heavily dependent on published research, and too little inviting of excellent teaching and service, then we cannot expect faculty to concentrate on teaching and service. It will not happen. Periodically planning with faculty members their research, teaching and service goals at the department level, and rewarding them based on their excellence in fulfilling those expectations, can become the essential ingredient in connecting mission with faculty work, and coming to grips with accountability in a sensible way.

To do that, we will need to develop all sorts of new ways to give greater flexibility to faculty careers and document achievement in the teaching and service areas. In that regard, I have been enormously impressed with the work of the Carnegie Foundation, the American Association for Higher Education, and Syracuse University in putting forward concrete ways to move teaching and service evaluation into the mainstream. I know I can speak for all three faculty unions in saying that we are enormously supportive of this work and will be encouraging it among our members.

And let me close by saying one more word about the union role in all this. First, as I said, AFT, and I believe our colleagues, are going to look very seriously at campaigning more effectively with the public on the question of higher education's work. We are going to look at ways to encourage through collective bargaining the kind of mission building and expansion of roles and rewards that I have just described. Again, AFT, and I believe our colleagues also, are going to work hard over the next academic year to meet with government leaders and other organizations to try to reach a possible consensus about what accountability ought and ought not to encompass.

I think we all need to explain to the public that, to do our job well, we need to have academic freedom, a good deal of faculty autonomy, and collegial decision-making. But that does not mean that we think we are accountable only to ourselves. Students, parents, government officials, community leaders all have a right to look at what higher education is doing and to assess our performance. We need to broaden faculty roles and rewards not just because faculty would like it better, but because it would allow faculty to contribute directly, in a clearly understood and negotiated way, to the achievement of key institutional goals. And I think that would be a great step forward.

ROLES, REWARDS, AND RESPONSIBILITIES

C. COLLECTIVE BARGAINING AND TECHNOLOGY

Christine Maitland, Coordinator
Higher Education Services
National Education Association

Technological developments have expanded dramatically. It is having a great impact on the work of faculty in higher education. One way to understand this impact is to review what is being bargained around the issue of technology. The negotiation of technology matters is in an emergent phase, with much left to be negotiated and, from the standpoint of faculty, with much left to be protected. Contracts have inadequately anticipated the potentials inherent in such technological usages as long-distance learning, telecommunications, and the entrance of the Internet into college classrooms. By and large, contracts of two-year institutions tend to have anticipated the impact of telecourses on workload more extensively than those of four-year institutions and have attempted to quantify the impact for purposes of calculating workload and compensation. Contracts of both two-year and four-year institutions contain provisions on property rights, although those of the four-year institutions tend to be less restatements of external law than adaptations of that law to the academic workplace. Workload sections follow a fairly traditional industrial model of seeking to protect workers through a definition of terms and conditions of a teaching-based load. In two-year colleges, the contracts are far more detailed in their provisions. For the most part the contracts in the NEA Higher Education Contract Analysis System (HECAS)[1] lack proactive provisions that will ensure the employees a voice in decisions around increasing productivity, creating or enhancing jobs, and sharing in the proceeds of such increases in productivity.

The word "technology" encompasses a wide range of issues including intellectual property rights, training, preparation time, job security, evaluation, and compensation. For example, if 2,000 students are signed up for a television course viewed in their homes, how should the class size be counted

---

This paper is excerpted from a chapter appearing in the 1995 NEA Almanac of Higher Education, titled "Trends in Bargaining: Restructuring and the Terms of Professional Labor" co-authored by Christine Maitland, Rachel Hendrickson, and Gary Rhoades.

for compensation? Once a faculty member is video taped and the tape is used again in subsequent semesters, who owns the rights to the video? What kind of preparation is involved in filming a course? Who owns the product? What kind of payment should the developer receive? Will technology supplement or supplant staff? Will training in the use of technology be provided? What resources will be available to staff? What are the standards for evaluation? Where does technological use fit -- under teaching or scholarship? How will the use of technology be evaluated?

INTELLECTUAL PROPERTY RIGHTS

Ownership of the products of faculty work is not just a theoretical issue. The institution that had no interest in laying claim to $500 in royalties for a scholarly book is now ready and willing to assert ownership over potentially lucrative patents or copyrights. There are instances of faculty inventions that have been worth millions of dollars and ownership of these inventions is sometimes contested. In 1989, the University of California estimated that the patent/licensing rights produced over $10 million of income from faculty works and predicted that in the next decade, it would be $40-50 million. The University of Wisconsin makes $50 million from the licensing of intellectual property. Other examples include: Gatorade was invented by a professor at the University of Florida; Stanisfloride was invented by a professor at Indiana University.[2]

Enghagen (1994) notes that "Faculty members will continue to encounter intellectual property issues in the course of their duties. While the legal issues are settled for many of the traditional facets of classroom instruction and research, new frontiers have arrived in the areas of distance education, and technology development and transfer."[3]

According to traditional common law principles, in the absence of an explicit agreement, the rights of employees to their inventions depends on the nature of the employment. The seminal case delineating rights to employee inventions during employment is United States v. Dubilier Condenser Corp. Dubilier involved the rights of two full-time laboratory researchers at the U.S. Department of Commerce's Bureau of Standards, who generated inventions while on the job, using the Bureau's resources and facilities. Focusing on the fundamental nature of the employee's job, the Supreme Court established that if an employee is hired to invent products as part of the job, then the patent belongs to the employer. If the employee is hired to do general work and the employee conceives an invention the "contract is not so broadly construed as to require an assignment of the patent." (Dubilier, 53 S. Ct. at 557). Further, if the employee creates his/her invention while on the job, using the employer's facilities and resources, the employer acquires an implied licensee or shop right to used the invention. These principles are established for both the private and public sectors. There is a difference in law between patents and copyrights. Copyright law vests ownership in the author, but allows employers to claim ownership if the work is within the

BEST COPY AVAILABLE

scope of employment. Courts have recognized a "teacher exception" to this doctrine for education materials created by teachers.

There have been lower court cases that apply the principles of Dubilier. In sum, it can be concluded that absent an express agreement assigning ownership rights, or conduct that might be construed as contractual acquiescence in university policies providing for such assignment, faculty members retain all rights to their inventions. However, if the invention is developed while on the job, using university materials and funding, the university may have a nonassignable licensee to use the invention. A further important distinction is in the determination of whether the invention is subject to patent law or copyright law. Faculty-created software is potentially a very lucrative product over which an institution might attempt to claim ownership. The legal precedents in this area makes the issue very important to unions that want to protect faculty property rights.

The most common provision bargained in the area of technology is copyrights and patents. Twenty-eight contracts in the NEA - HECAS have a section on this topic. Many of the contracts have language similar to that found in common law. If the individual develops the product on his/her own time and without college resources, then the copyright or patent belongs to the individual. If the person uses university resources then usually the faculty member and the campus share the copyright or patent. Or in some of the contracts, once the campus has been reimbursed for using its resources, then the faculty member owns the rights to the product. In some cases, if there is not written agreement to the contrary, then the campus owns the product. One example of this language appears in the Shoreline Community College in Washington contract, Article 7, "Copyrights and Patents" which states:

> a. The ownership of any materials, processes or inventions developed solely by an academic employee's individual effort and expense shall vest in the academic employee and be copyrighted or patented, if at all, in the academic employee's name.
>
> b. The ownership of materials, process or inventions produced solely for the College and at College expense shall vest in the College and be copyrighted or patented, if at all, in its name.
>
> c. In those instances where materials, process or inventions are produced by an academic employee with college support by way or use of significant personnel, time, facilities, or other college resources, the ownership of the materials, processes or college resources, the ownership of the materials, process or inventions shall vest in (and be copyrighted or patented by, if at all) the person designated by written agreement between the parties entered into prior to the production.

> In the event there is no such written agreement entered into, the ownership shall be apportioned between the parties utilizing the binding arbitration procedures."

IMPACT OF TECHNOLOGY

It is clear from some of the contract language, that campuses are attempting to grapple with the new technology and its impact on the campus. Several contracts have interim provisions to develop technology on a class by class basis until the parties can fully negotiate provisions on the use of technology. From an analysis of the contract provisions that exist in the sample, it appears that the unions are concerned about technology replacing workers, workload, training, and evaluation.

The Florida State University System contract article titled, "Instructional Technology," which defines the broad scope of technology issues and concerns. It also moves towards establishing a philosophical basis for the use of technology:

> (a) The parties recognize the increasing use of new technology, such as video tapes and computer software, to support teaching and learning and to enhance the fundamental relationship between employee and student. Furthermore, the parties also recognize that this technology should be used to the maximum benefit of the university and the employee.
>
> (b) Instructional technology material includes video and audio recordings, motion pictures, film strips, photographic and other similar visual materials, live video and audio transmissions, computer programs, computer assisted instructional courseware, programmed instructional materials, three dimensional materials and exhibits, and combinations of the above materials, which were prepared or produced in whole or in part by an employee, and which are used to assist or enhance instruction. (Article 9.8)

The contract goes on to provide that if the Instructional Technology is done without University resources then the employee owns the product. If the work is done with University resources, then the employee and the university "shall share in the proceeds." (Article 18.3)

Gogebic Community College in Michigan has an article on Telecommunications which addresses a very important issue for the unions -- the potential for job loss. The contract states:

> The telecommunications education system is an electronic educational network designed to provide an alternative means of instructional delivery to provide education resources to students in a cost

> effective and efficient manner. A telecommunications education system shall not cause the layoff, replacement, displacement, or reduction of any faculty member's work hours. . . Class schedules utilizing Telecommunication as a delivery system will be determined as part of the normal scheduling process. . . . faculty will be offered first opportunity to instruct Telecommunications activities based on seniority. Pay shall be determined in accordance with the credit/contact value of the course, whichever is appropriate. (Article XVII)

Technology and jobs is also the subject of a contract provision at Grand Valley State University in Michigan. The contract covers support personnel and states:

> . . . the University and the Association recognize the introduction and expansion of electronic technology at Grand Valley State, including CRT's, work processing machines and other electronic devices. The University hereby confirms that such equipment introduced to date was not procured for the purpose of eliminating bargaining unit work. In the event that the expansion of new technological devices makes skills obsolete, the University agrees to make reasonable efforts to make available training opportunities to employees to improve existing skills or develop new skills so that employees may better serve the needs of the University. Nothing in this Agreement shall be construed to limit the University [sic] right to introduce new electronic technology.

The parties to the agreement at Oakland University (Michigan) determined they did not have enough experience to bargain in the technology area although they agreed on the intent to bargain in future contracts. "Therefore, during the term of this Agreement, Oakland and individual faculty members may enter into written agreements for experimentation with these new media. Said agreements may delineate such items as form of compensation, recapture by Oakland of production costs, royalties to be paid, ownership of copyrights, and preparation of accompanying materials." Further, the association will be provided copies of the agreements and notified about the credit hours used by media courses.

The contract for the Pennsylvania State System of Higher Education recognizes that "technology allows methods of instruction different from traditional instruction in-the-classroom including, but not limited to, long distance education which involves teaching students by technological link-ups." Methods of instruction may include "instruction utilizing satellites, fiber optics transmission, full-motion video, cable TV, microwave transmission, audiographics/computer, and videotapes." Like the prior contract, the parties recognized that the technology was changing so rapidly it was not possible to bargain all the specifics. So they determined the technology courses would be approved by local and state "Meet and Discuss" (a union/management committee). The new courses would also need the approval of the University curriculum process. Other provisions in this article provide that "technology shall NOT be used to reduce, eliminate or consolidate FACULTY positions." The article also provides for additional compensation for the development and delivery of technology courses and the development of evaluation guidelines. It concludes: "Due to the constantly changing technologies, this Article will be reviewed and/or revised at the time of the contract negotiations."

The contract for Schoolcraft College in Michigan has extensive provisions for television classes. Prior to receiving an assignment of a television course the faculty member must attend an orientation session. "Due to the unique requirement of distance education courses coupled with the varied needs of adult learners," the instructor is responsible for several duties: viewing the course videos prior to the beginning of class, preparing a special format syllabus which is distributed to students at the first class session, communicating with students by phone or mail at least two times a month at college expense, a minimum of three review sessions for the students, and tests. No faculty member is "required to teach a television course unless it is necessary to make a basic load." Most television courses are taught as supplemental classes and there is a class size limit specified in the agreement.

Eighteen of the contracts address workload and technology. Youngstown State University provides that: "Up to three (3) computer-based and/or medial-based courses may be developed and/or taught on an experimental basis during each academic year of this Agreement, providing the faculty member who teaches each course receives regular workload credit for it the first time it is offered, and providing further that the Administration and the Association reach agreement on workload credit for the course prior to it being offered a second time." The parties further agree to negotiate provisions for these courses in the next contract. The Salem Community College contract in New Jersey specifies that Computer-Assisted Instruction will be compensated at a per student rate of $26.80 in 1993-94. The Barstow Community College Contract in California provides that, "hours for television courses are the units assigned to the individual class." The Spoon River College in Illinois states that "the utilization of new technology that results in different or innovative class or schedule arrangements that have the mutual approval of the college and the employee may be assigned as requested by either a faculty member or the college." The contract for North Central Voc-Tech in Wisconsin provides that "Telecourses shall have a value of three and one-half percent (3.5%) per credit and a maximum enrollment of 32 students." The parties agreed to assign this provision to a "Labor/Management Work Load Committee" for study.

The agreement for Ferris State University in Michigan has an article, "Courses taught by non-traditional methodology" which provides:

> a. Credit-bearing courses taught by non-traditional methods (television, computer

aided instruction, video tape lecture, or any other electronic or other media) will be offered consistent with department procedures.

b. Courses offered by any of the above methods will be assigned an instructor (s). The department head/supervisor and instructor(s) shall mutually determine, in advance and in writing, the contact hours required by the assignment which shall be considered part of the instructor's (s') class load.

Whatcom Community College in Washington divides technology-assisted courses into three categories for calculation of contract hours. "Mediated Instruction System Facilitation" (MISF) requires the least amount of work by a faculty member, and therefore requires no adjustment in workload. MISF involves instruction "wherein coursework is totally packaged and faculty are not required to do curriculum development/revision, preparation, grading, or consultation beyond contracted hours." Where the faculty member is required to "do some curriculum development/revision, diagnosis, planning, evaluation, and outside consultation," adjustments in contract hours are made. Further adjustments are made for telecourses which "do not require, beyond the norm, curriculum development or faculty/student interaction (including evaluation)."

In California, at Coast Community College District there is a unit of part-time faculty which provides extra pay for activities directly related to teaching. "These activities shall include but not be limited to substituting; telecourse design and development; alternative learning services; open laboratory classrooms with one-on-one tutoring (basic skills, language labs, ESL labs, and computer labs). The rate is $215 per day ($26.88 per hour)." Clark College in Washington has a provision that "telecourses are paid at the lecture rate with no bonus for enrollment. However, if enrollment exceeds standard capacity by 15 a second section will be opened and paid. If double capacity is reached plus 15, a third section will be opened and paid, etc."

The use of technology also brings up issues of evaluation/monitoring. The Pensacola Junior College contract in Florida has a provision for administrative evaluation of faculty which prohibits the use of "any electronic recording device in the process of evaluating faculty." The contract for Mt. San Antonio Community College in California states the following: "In the evaluation process, faculty shall be free from any and all forms of electronic or other listening or recording devices, except with his/her express and non-continuing consent." At Monterey Peninsula Community College in California faculty may choose to be evaluated by "electronic recording devices."

It is clear from the above discussion that the use of technology in higher education is multifaceted and a complex issue. The number of agreements that have provisions to approve the use of technology on a case by case basis and bargain full provisions in the next contract indicates that this is an arena of great uncertainty. The parties do not have enough information to negotiate contract provisions so they agree to work through labor/management committees until they can bargain all the implications. It is also clear that the parties are not resistant to using technology and non-traditional ways of teaching, but they are proceeding with caution as it relates to the impact of technology on the more traditional areas of compensation, workload, and evaluation. This is an area of contract negotiations that will be developing over the next five to ten years as institutions turn to increased use of technology as a means to maintain or increase productivity in light of continuing fiscal restraints.

ENDNOTES

1. The NEA Higher Education Research Center selected a nationwide sample of approximately 200 contracts balanced for factors such as two-year and four-yer campuses, geography, and type of employees. The Texts for these contracts were scanned into a computer and then analyzed using software that can search for specific words or phrases. The Higher Education Contract Analysis System (HECAS) enables users to query items commonly found in contracts and to analyze the language.

2. Figures for this section were presented at the 1993 Baruch College Collective Bargaining in Higher Education Conference by Lawrence A. Poltrock, General Counsel for the AFT, in a session titled, "Campus Bargaining and the Law" April 20, 1993.

3. Enghagen, Linda K. "Intellectual Property Concerns for Faculty," paper presented to the NTU Faculty Forum Series, sponsored by the U.S. Department of Energy, December 7, 1993.

ROLES, REWARDS, AND RESPONSIBILITIES

D. LESBIAN AND GAY CAMPUS ORGANIZING FOR DOMESTIC PARTNER BENEFITS[1]

M.V. Lee Badgett, Assistant Professor
School of Public Affairs
University of Maryland

INTRODUCTION

Almost as soon as the first sign of what we now know as the AIDS epidemic appeared, gaps in the legal status of gay men's family structures became painfully obvious. Anguished men were legally denied entrance to hospital rooms to visit their ill longtime lovers. Gay workers could not ask for work leave to care for their dying partners or to grieve once their lovers were gone. Gay men with AIDS were forced to seek government-provided medical care because their partner's employer did not recognize their family relationship in the granting of employment benefits. Gay men lost homes and possessions when their partners died without wills, leaving material possessions to biological relatives by default. The vulnerability of lesbian family life was revealed not just in the experiences of lesbians' gay male friends, but in the stories of women such as Sharon Kowalski and her partner Karen Thompson, who were a *cause celèbre* among lesbians in the mid-1980s. After an auto accident physically incapacitated Kowalski, the two were kept apart for five years as Minnesota courts allowed Kowalski's parents to deny Thompson visitation rights and input decisions about Kowalski's rehabilitation.

Add to those tragic scenarios the more hopeful pressure from the "lesbian baby boom" and the aging of a generation of lesbian, gay and bisexual activists, and the growing movement to expand the social and legal definitions of family to include those families based on homosexual relationships can come as no surprise. Facing an enormous task in changing centuries-old public policies defining families and marriage, lesbian, gay, and bisexual activists have often found faster but rewarding results within their work places, the source of much of the economic glue that holds families together, providing both wages and benefits. And those work places with relatively tolerant environments, democratic governance, and social influence, such as colleges and universities, are the sites of many successes in this new wave of workplace collective action. At least 25 campuses (see Table 1) now include lesbian and gay employees' "domestic partners"[2] and

Table 1: Campuses Offering Domestic Partner Health Care Benefits

University or College	Date	Opp. sex?	Time Req.?	Documents Req.?	Affidavit Req.?	Health Care	Other Ben.
American	Fall 1993	No			Yes	Yes	Some
Brown	5/1/94	No	1 yr. resid.	Yes	Yes	Yes	Not yet
Chicago	2/1/93	No	none	No (1)	Yes	Yes	Yes
Clark	6/1/93	No	1 yr. resid.	Yes	Yes	Yes	Yes
Columbia	1/1/94	No	6 mon. resid.	No	Yes	Yes	Yes
CUNY	1/1/94	Yes	6 mon.	Yes (2)	Yes	Yes	No
Dartmouth	1/1/94	No	none	No (1)	Yes	Yes	Yes
Harvard	1/94	No	6 mon.	Yes (2)	Yes	Yes	Yes
Iowa	1/93	No	none	No	Yes	Yes	Yes
Iowa State		No	none	No	Yes	Yes	Yes
Middlebury	9/1/93	Yes	6 mon.	?	Yes	Yes	?
Minnesota	10/93	No	none	No (1)	Yes	Yes (3)	Yes
MIT	6/1/93	No	4 mon. resid.	Yes	Yes	Yes	Yes
Northeastern							
NYU							
Penn	4/94	No	none	Yes	Yes	Yes	Yes
Pitzer Col.	3/1/92	Yes	none	No	Yes	Yes (3)	?
Pomona Col.	9/93	Yes	none	Yes	Yes	Yes (3)	Yes
Princeton(4)	7/1/94	No	none	Yes	Yes	Yes	Yes
Smith	1/1/94	No	1 year	No	Yes	Yes	Some
Stanford	2/1/93	No	6 mon.	No	Yes	Yes	Yes
Swarthmore							
Vermont		No	6 mon.	No	Yes	Yes	No
Wesleyan							
Yale	1/1/94						

Notes: (1) Employee must be able to produce documentation if requested.

(2) Must also register with a local municipality, which might have different requirements.

(3) Not covered under university health plan, but employees reimbursed for at least some of the expenditures on partner's individual health plan.

(4) This is the definition for DP access to university facilities, but may change for health benefits.

Sources: Interviews with university staff, faculty, and administrators at CUNY, Brown, Middlebury, Vermont, Pomona, Iowa, Iowa State, Smith, Penn, Princeton
Press releases from Columbia, Harvard, MIT, Penn
University Documents from Stanford, Chicago, Pitzer, Dartmouth, Middlebury, Clark

their children in health care benefit programs, and many other colleges and universities offer lesbian and gay families less costly benefits such as family-related leave and access to university facilities.

Most of the media attention and universities' fiscal concerns have focused on the benefits sought by lesbian, gay, and bisexual workplace activists, and I will also focus this overview of gay labor issues on family-related benefits. Adding sexual orientation to campus nondiscrimination policies, incorporating lesbian, gay, and bisexual issues into the curriculum, and addressing the campus climate for students are some of the other changes being promoted by campus workplace and academic activists. But none of those issues comes close to the benefits issue in igniting the passions of lesbian and gay staff and faculty, most of whom believe that benefit plans based on marriage blatantly discriminate against their families since lesbian and gay couples cannot legally marry. As campuses come to agree that faculty, students, and staff of all sexual orientations should be treated equally,[3] compensation policies that fail to recognize the equality of lesbian and gay families will be difficult to defend.

Employment benefits take many forms at universities, including tuition remission, family-related leave, access to university facilities, and, of course, employer-provided health care benefits, which constitute the golden ring for activists and the greatest fear for cost-conscious university officials. Since the process of obtaining domestic partner access to benefits is quite similar for other forms of benefits, this paper will focus on the contentious issue of health care benefits. The patterns noted in this paper are based on written documents from universities or employee committees, on interviews with faculty and staff, and on my informal contacts with lesbian, gay, and bisexual workplace activists over the last two years. The first question considered asks what gay employees want in place of the current qualifications for benefit eligibility. The strategies and achievements of gay employees are then considered, followed by a discussion of universities' responses and concerns.

WHAT LESBIAN AND GAY EMPLOYEES WANT

On the face of it, lesbian and gay staff and faculty seek simple equality: their relationships and families should have equal status with those of their legally married colleagues in qualifying for access to an employer's benefit policies. The most complete way of achieving that particular goal would be to legalize marriage for two people of the same sex, a goal being sought in several states and localities across the U.S. However, the motives of lesbian and gay employees seeking domestic partner benefits within a particular workplace vary in ways that reflect the history and politics of the lesbian and gay movement more generally. This variation in motives has important implications for the rationale for and form of domestic partner benefits sought.

One strand of political activism within the lesbian and gay communities struggles for liberation from social institutions, such as marriage, that restrict the range of human expressions of sexuality and commitment. Paula Ettelbrick, a prominent lesbian legal activist, argues against marriage from this perspective: "Marriage runs contrary to two of the primary goals of the lesbian and gay movement: the affirmation of gay identity and culture and the validation of many forms of relationships."[4] Within this political framework, domestic partnerships constitute an alternative legal form for relationships and families that should exist alongside the option of traditional marriage for both homosexual and heterosexual couples. Workplace activists with this perspective are likely to argue that employment benefits based on marriage discriminate against all unmarried couples, whether gay or straight. Those activists will push for domestic partner definition that include opposite sex as well as same sex couples and may find allies among non-gay employees who will benefit from increased access to benefit plans.

A second strand of gay political activism emphasizes civil rights and the pursuit of equal treatment where such treatment is denied purely because of sexual orientation. In this view, providing benefits based on legal marriage clearly discriminates against lesbians and gay men: opposite sex couples always have the marriage option but same sex couples are not legally allowed to marry. From this perspective, recognition of same sex couples' domestic partnerships alleviates some of the inequality based on sexual orientation.

Of course, once principles meet political pragmatism, such a clear-cut distinction between the liberation and civil rights motivations may not be obvious in the domestic partnership eligibility proposed by employee groups. Most -- but not all -- groups start off advocating for the inclusion of both opposite sex and same sex partners. At Pomona College, the lesbian and gay staff and faculty group proposed a definition covering only same sex partners, but the college administration added opposite sex partners to this policy. A CUNY task force recommended giving benefits to same sex partners, but city-wide negotiations ultimately resulted in both opposite sex and same sex partners receiving benefits. In other cases, legal strategies limit coverage. When groups have sought domestic partner policies based on sexual orientation nondiscrimination laws and policies, such as at the University of Vermont and Rutgers University, only same sex partners could be included.

Furthermore, since the organizing efforts at universities have been led by lesbian and gay employees and since unmarried heterosexual couples do not appear to be a well-organized group, a classic free rider problem results in which heterosexual unmarried couples do not participate in the gay groups' efforts. As a consequence, gay groups may effectively treat opposite sex unmarried couples as a less important issue or as a bargaining chip to be dropped at an employer's insistence. Even when unmarried heterosexual couples are involved in the political process, as they were at Dartmouth College,[5] employee pressure may not be enough to overcome universities' resistance to broad domestic partner definitions. Universities' compromise positions often involve dropping opposite sex couples for practical reasons (they would be too expensive to cover) and philosophical reasons (they can choose to marry if they want benefits). Thus both rhetorically and practically, policies promoting equality rather than liberation have proven more accessible goals for lesbian and gay faculty and staff, although complete equality with married couples has proven impossible to obtain, as discussed in a later section.

HOW GROUPS ARE WORKING TO GET DOMESTIC PARTNER BENEFITS

The workplace has become the latest site of lesbian and gay grassroots organizing and collective action. National conferences and publications devoted to gay workplace issues, the formation of a Workplace Project within the National Gay and Lesbian Task Force, and even the popularity of computer bulletin boards devoted to domestic partnership issues all attest to the growing number and sophistication of lesbian, gay, and bisexual workplace activists. Many campuses have either a formal lesbian and gay staff and/or faculty group or an informal network of employees. These groups appear to be the source of most efforts to persuade their universities to grant domestic partnership benefits.

Whether formal or informal, gay staff and faculty groups on different campuses follow similar courses of action: collecting information, strategizing paths, and lobbying administrators. Most campuses have formal bureaucratic processes for policy changes, and gay employee groups will often try several avenues. For relatively small, self-contained (usually private) colleges and universities, these procedures may be straightforward and sufficient. For instance, the gay and lesbian group of Middlebury College (GLEAM--Gay and Lesbian Employees at Middlebury) gathered information on the experiences of other schools with domestic partner benefits and wrote a position paper supporting a policy change.[6] After gaining the support of the local AAUP, GLEAM sent the paper to the President of the College, who presented the paper to the College's trustees and gained final approval of the new policy. Many other colleges and universities have also followed this persuasion path. But this path may be quite complicated, especially for state universities. For instance, at the University of Maryland employees receive some benefits from the campus (access to recreation and child care facilities), some from the state university system (tuition remission and family-related leave), and some from the state (health care and pensions).

If persuasion is successful at an early informal stage, high level campus officials -- chancellors, presidents, or provosts -- may appoint an official university committee to study the issues and make recommendations. At Harvard, the provost appointed a committee made up of faculty, staff, and union members to look into domestic partnership.[7] The Chancellor of the CUNY system appointed a task force "charged with examining the issue of providing University benefits to the domestic partners of lesbian and gay CUNY employees."[8]

(As discussed below, however, the efforts of this committee were overshadowed by other events). The President of the University of Minnesota appointed a commission to investigate general campus issues for lesbian, gay, and bisexual faculty, staff, and students.[9]

Formal collective bargaining has not yet been an important avenue for creating domestic partner benefits at colleges and universities, but unions have supported such efforts and have participated in coalitions with other groups of faculty and staff, as at Harvard and CUNY. At the University of Minnesota, AFSCME and the Teamsters pushed domestic partner benefits in negotiations with the state until state officials instructed them to negotiate directly with the university. In some cases, universities have offered domestic partner benefits to non-unionized employees, waiting for the next contract to negotiate benefits with bargaining unit employees (e.g. Dartmouth).

Another important channel for obtaining domestic partner benefits has been through formal grievance procedures and lawsuits, whether actual or threatened. After exhausting all internal grievance procedures, University of Vermont activists successfully argued before the Vermont Labor Relations Board that the university's sexual orientation nondiscrimination policy covered benefits.[10] The CUNY policy was a direct result of the New York City's negotiations with the Municipal Labor Council that were initiated to settle a lawsuit brought by other city employees, Gay Teachers Association v. Board of Education of the School District of New York.[11] Plaintiffs in the recently filed Rutgers case claim that the benefits policy discriminates because of sexual orientation, violating the University's own policy, the governor's executive order, and the state's anti-discrimination law.[12] Sometimes just the fear of a lawsuit encourages universities to expand their benefits policies to include domestic partners. Professor Richard Cornwall of Middlebury College believes that the University of Vermont decision was the "key" to rapid approval of Middlebury's policy.[13]

CREATING A NEW RELATIONSHIP: WHAT IS A "DOMESTIC PARTNER"?

A college's or university's recognition of the equivalence of legal marriage and domestic partners for purposes of benefits is only a first step. In a few cities unmarried partners may register as "domestic partners" (or some similar term) to publicly record the existence of their relationships and to acclaim its public importance. However, in most places no personal, committed relationship other than legal marriage is recognized and defined, requiring employers to create their own definition.[14] Over time, common elements of these definitions have evolved, although the particular requirements within each element vary (see Table 1). The similarities probably have less to do with a common understanding of the essence of domestic partnerships than with the use of other schools' (and other employers') definition as models.

General definitions of domestic partnership outline a relationship that is culturally and economically similar to marriage, both in terms of the form of the relationship (two people in an exclusive relationship) and the expectations of economic interdependence:

> "...[T]wo individuals of the same gender who live together in a long-term relationship of indefinite duration, with an exclusive mutual commitment similar to that of marriage, in which the Partners agree to be financially responsible for each other's well-being and each others' debts to third parties."[15] (Stanford University)
>
> "...[A] committed relationship of shared emotional and financial responsibility...."[16] (Pitzer College)
>
> "...[T]wo individuals of the same gender who live together in a long-term relationship of indefinite duration, with an exclusive mutual commitment in which the Partners agree to be jointly responsible for each other's common welfare and share financial obligations."[17] (University of Chicago)

The elements of domestic partnership eligibility typically emulate some ideal or practical form of marriage rather than the actual legal standards for entering into and maintaining a marriage. Typical elements found in domestic partnership definitions and declarations include some or all of the following:

(1) time requirements: some "front end" minimum time requirement for the existence of the partnership before being eligible for benefits, ranging from no requirement (e.g. Chicago and Pitzer) to six months (e.g. Stanford, CUNY, and Middlebury) or twelve months (e.g. Iowa); sometimes a "back end" time requirement specifying a period of time (usually a year) from termination of one domestic partnership to the recognition of another partnership;

(2) evidence of financial interdependence, particularly shared assets and debts;

(3) sharing joint residence, whether rented or owned;

(4) boundaries for the relationship, including exclusivity, no close blood relationship, and no current legal marriage;

(5) naming a partner as a beneficiary of life insurance or pension plans.

In all university plans, the employee and his or her domestic partner must sign an affidavit attesting to their relationship and to meeting the eligibility criteria. In some cases, partners must provide proof of joint residence and/or financial interdependence.

These criteria exceed the legal requirements for marriage and for married couples' qualifications for employment benefits, especially in terms of minimum time requirements, joint residency, and shared assets. As a result, some lesbian and gay employees resent this continued inequality even though they may also recognize the validity of universities' concern about recognizing relationships that would be otherwise untraceable and susceptible to fraud. Many lesbian and gay employees believe that their employer should trust them, just as employers trust married employees who often can simply add a spouse's name to benefit forms without further proof or justification.

One important remaining inequality between domestic partnerships and marriage has nothing to do with employers' attitudes, but stems directly from the federal tax code. For employees and their legal spouses (as defined by state law), the amount paid by an employer for health care benefits is not considered taxable income. But according to a private letter ruling by the Internal Revenue Service, the value of an employer's contribution to a domestic partner's premium is taxable income, unless the partner can meet fairly strict criteria for being a dependent.[18] In practice, then, partnered lesbian and gay employees cannot achieve equality with their married colleagues until either marriage laws or tax laws are changed.

EMPLOYER RESPONSES AND MOTIVATIONS

Although college and university administrations may be inclined to offer benefits to domestic partners and their dependents for reasons related to equality, competitiveness, and conflict avoidance, several concerns inevitably arise. University officials typically raise the issues of potential fraud, higher insurance costs, insurance carrier resistance, and political fallout. As experience with administering domestic partner benefits accumulates, most of these concerns have been allayed by demonstrating that the underlying assumptions are either flawed or that the problems can be mitigated through careful design and implementation.

Concerns about fraud have proven the easiest to accommodate. Administrators worry that employees will falsely designate their non-employee friends as domestic partners to receive benefits. Of course, the same could be true for legally married couples, and evidence exists that employees will sometimes claim benefits for an opposite sex partner when the couple is not legally married. For example, a survey of San Francisco's city employees revealed that 0.9 percent of city employees falsely claimed to be married to receive benefits.[19] As noted in the discussion of domestic partner definitions, clarifying the meaning of domestic partner and requiring an affidavit are intended to prevent fraudulent partnership claims, a goal that must be politically balanced with the recognition that married couples usually do not have to meet the same standards of proof.

Given that these organizing efforts have taken place in a time of budgetary pressure, cost concerns have been the biggest stumbling block in the area of health care benefits, with cost increases expected from higher enrollment and the possibility of adverse selection (the enrollment of people with higher-than-average health care costs).

The number of new enrollees will depend on several factors, most of which cannot be precisely predicted. First and foremost, the number of eligible couples will be important. Data from the 1990 Census on unmarried partners provides some information on the prevalence of both opposite sex and same sex unmarried partner households, but the fact that "unmarried partner" was a new and unpublicized category probably resulted in under-reporting of such relationships. Overall, 3.3 percent of U.S. households contained an unmarried partner of the opposite sex, and 0.16 percent of households contained same sex unmarried partners.[20] Geographic variation further complicates predictions. For instance, 4.8 percent of California households contain unmarried opposite sex partners and 0.35 percent contain same sex partners, but only 2.2 percent of North Dakota households contain unmarried opposite sex couples and 0.04 percent have same sex couples. Furthermore, people who are "unmarried partners" according to the Census Bureau may not qualify as domestic partners.[21]

A second factor related to enrollment changes concerns the need for additional benefits for these couples. Enrollment might not change at all if the non-employee half of the couple already has health insurance, perhaps from his or her own employer. Lesbian and gay couples, in particular, do not have the same social and public policy-related incentives (such as tax laws and marriage laws) to have one partner engage in market work and one partner work at home, making it more likely that both partners work outside the home and receive their own health benefits.

A third factor specific to lesbian and gay couples is the requirement that an employee "come out" as gay to sign up a partner for benefits. Workplace disclosure of sexual orientation remains a risky proposition for lesbian and gay employees, and even the prospect of receiving added benefits may not induce some gay workers to take that step.[22] And finally, the fact that these benefits are taxed will reduce their value to the employee and his/her domestic partner.

Given these forces that should reduce the number of lesbian and gay domestic partners who are likely to take advantage of health care benefits, the fact that few couples have signed up at colleges and universities offering these benefits is not surprising. The CUNY report cited earlier quoted data from a Harvard study of 16 employers, whose enrollment increased an average of 0.3 percent when same sex domestic partners are given health care benefits and by 3.4 percent when employers offered benefits to opposite sex and same sex partners.[23] Data for some universities in Table 2 shows similarly low enrollment rates for same sex partners. (Interestingly, these enrollment increases are quite similar to the proportions of unmarried couples in the 1990 Census data.)

Table 2: Health care benefit nrollment information from selected universities

Employer	Date of information	No. Same Sex Partners Enrolled	Total No. of Employees Covered
Chicago	2/93 to 11/93	25	6,400
Dartmouth	1/94	8	2630 (plus 370 union not eligible yet)
Iowa	3/29/94	16	14,000 (2,000 single)
Iowa St.	3/29/94	3	
Minnesota	3/94	21	
Northeastern	3/94	13	
Smith	3/94	3 (total of 14 registered)	
Stanford	2/93 to 11/93	28	11,000
Vermont	3/94	approx. 11	3,300

Sources: Stanford and Chicago: Michele N-K Collison, "Benefits for Gay Couples," *Chronicle of Higher Education*, Nov. 3, 1993, p. A17.
Vermont: Prof. Esther Rothblum
Iowa and Iowa St.: Richard Saunders, U. of Iowa.
Smith: Prof. Martha Ackelsberg
Dartmouth: "Only a Few Same-Sex Couples Sign Up for Dartmouth Benefits," *Valley News*, 1/22/94, p. 1.
Minnesota: Marjorie Cowmeadow
Northeastern: Jean Steffes

Employers' other major cost-related fear is adverse selection and resulting premium increases. Strict requirements for being considered a domestic partner reduce the likelihood that employees will sign up their sick friends rather than a true partner. Employers also worry that even the legitimate partners of gay male employees will be HIV-infected, creating the potential for huge future medical expenses that will raise the premium for all employees. Several factors mitigate against this fear. First, lesbians have a lower than average rates of HIV infection, which should even out the overall probability somewhat. Second, the treatment of AIDS/HIV costs less than the treatment of other serious health conditions more common to heterosexuals, such as pregnancy complications. And third, this fear has not been realized in the experience of domestic partner benefit providers.[24] The CUNY report, again citing a Harvard study, shows that only three out of the 16 employers studied experienced premium increases (and premiums rose for one carrier out of the four used by Children's Hospital in Boston), and even in those cases it is not clear that higher than average claims of domestic partners caused the increase.

One employer fear with some factual basis has been the difficulty convincing insurance companies to cover domestic partners. Self-insured plans accommodate domestic partners relatively easily, and in most cases, negotiations and information have helped to overcome carriers' initial objections.[25] For instance, all of Brown University's insurance carriers originally refused to provide coverage. Eventually all carriers agreed to include domestic partners, mainly because the university was willing to make the partner definition more stringent and to add a documentation requirement.[26] Sometimes, however, this reluctance cannot be overcome. Several schools, notably Pitzer and Pomona, have had to settle for (partially) reimbursing employees for the cost of a partner's individual health plan. The University of Minnesota will reimburse employees for expenditures for a partner's individual coverage up to $2250, the amount spent on legal spouses, since the state health plan will not cover domestic partners. All involved hope that these are short term solutions, since individual plans are more expensive and offer fewer benefits than group coverage.

As employers and insurers gain experience with domestic partner coverage, this reluctance should lessen. Another hopeful sign is that some insurers and health care providers are now offering domestic partner benefits to their own employees. Blue Cross and Blue Shield of Massachusetts began offering health benefits to employees' domestic partners (both same sex and opposite sex) on 1/1/94.[27] Kaiser Permanente in Northern California now offers benefits to partners of physicians and some other non-unionized employees.[28]

Some universities also worry about the loss of contributions from disapproving alumni. No evidence exists that this is a major problem, although the University of Chicago has heard many complaints from alumni.[29] State universities may face special problems when politicians get involved. The mere discussion of domestic partner benefits in the Virginia state universities sent the state's political leaders into a tailspin.[30]

Of course, universities should also consider the positive side of extending benefits to employees' domestic partners. For one thing, lesbian and gay alumni may be more likely to contribute or to increase their contributions, thus balancing out or even exceeding any lost contributions from disgruntled conservative alumni. (Minnesota has had many positive reactions from lesbian, gay, and bisexual alumni and donors.[31]) And more importantly, employees who feel valued and accepted, regardless of their sexual orientation, are likely to be more productive employees. Offering domestic partner benefits may also give a school a competitive advantage in attracting faculty and staff, a phenomenon that probably explains the rapid acceptance of partnership benefits among the Ivy League universities and other prestigious schools.[32]

CONCLUSION

This overview of the process and issues that are involved in this new wave of collective action by lesbian, gay, and bisexual employees should suggest that the pressure for domestic partner benefits will only grow louder and stronger, regardless of setbacks from courts, legislatures, and insurance companies. Because university bureaucracies and political situations vary, the differences in strategies that is already evident may become more pronounced. As more colleges and universities recognize domestic partners, pressure is likely to increase on other schools, both because of competition for faculty and staff and because increased experience will help convince insurance companies. Even without one big "union" of all lesbian, gay, and bisexual employees, increasing political sophistication and communication between campuses will make gay employees' appeal to equity difficult for their employers to ignore.

ENDNOTES

1. I would like to thank Tracy Hamblet for her research assistance.

2. "Domestic Partner" is used in virtually all campus policies related to long-term non-marital relationships. Some companies and at least one university (MIT) use the term "spousal equivalent."

3. Two years ago, the National Gay and Lesbian Task Force reported that 288 campuses included sexual orientation in nondiscrimination policies. No doubt many other campuses have taken the same step since then.

4. Paula Ettelbrick, "Since When is Marriage a Path to Liberation?" OUT/LOOK National Gay and Lesbian Quarterly, No. 6, Fall 1989. (Also see the companion piece by Thomas B. Stoddard, "Why Gay People Should Seek the Right to Marry.")

5. Interview with John G. Crane, Dartmouth College, 3/29/94.

6. Interview with Prof. Richard Cornwall, Middlebury College, 3/24/94.

7. The Harvard Community Resource, Vol. 88, No. 2, October 1993; posted on Domestic Partner Bulletin Board (domestic@cs.cmu.edu) on 10/20/93.

8. "The Report of the CUNY Study Group on Domestic Partnerships," The City University of New York, October, 1993. Information on the appointment of the committee from interview with Prof. Kenneth Sherrill, Hunter College, CUNY, on 3/24/94.

9. Interview with Dean Marjorie Cowmeadow, University of Minnesota, 3/29/94.

10. B.M., S.S., C.M., & J.R. v. University of Vermont, Vermont Labor Relations Board No. 92-32, 16 V.L.R.B. 207 (1993).

11. Interview with Prof. Kenneth Sherrill, Hunter College, CUNY, 3/24/94; "New York City Employees Get Partners Benefits," The Washington Blade, 11/5/93.

12. Interview with Prof. William Mayo, 3/23/94.

13. Interview with Prof. Cornwall, 3/24/94.

14. And even in New York City, where domestic partners can register their relationship, such registration is necessary but not sufficient for city employees who wish to cover their partners in the city's health care plan. (Interview, Kenneth Sherrill).

15. Total Compensation News, Stanford University, December 1992, p. 1.

16. "Overview of Pitzer College Reimbursement Plan for Domestic Partner Health Coverage," approved by Faculty Executive Committee, 1/30/92.

17. University of Chicago, Office of Staff Benefits, "Questions and Answers for Domestic Partners," 1/15/93.

18. *Ltr. Rul.* 9231062, discussed in "Health Benefits for Employee's Domestic Partner Not Taxed," The Journal of Taxation, November 1992, p. 316. This note cites the criteria for dependency in Section 152(a)(9):

> an individual (other than...the spouse...) who, for the taxable year...has as his principal place of abode the home of the taxpayer and is a member of the taxpayer's household. Assuming the cohabitant has the employee's home as his principal place of abode, it will also be necessary, under 6Section 152(a), for the employee-taxpayer to contribute more than one-half of the support of the partner.

19. Approaching 2000: Meeting the Challenges to San Francisco's Families, The Final Report of the Mayor's Task Force on Family Policy, June 13, 1990, p. 32.

20. The calculations use data in a spreadsheet provided by the Census Bureau: "Unmarried-Partner Households, by State: 1990," STF 4, Population Division, Bureau of the Census.

21. Note that these percentages are far lower that those that would come from applying estimates of the prevalence of homosexuality to employment figures. Those estimates range from 10% (the Kinsey figure widely considered to be too high) to 1% (a figure from a recent study conducted at Battelle widely considered to be too low). Using a middle range figure such as 5% and assuming that 40% of lesbian and gay people are in a relationship (this is the low end of the range from studies of gay men and lesbians) would imply that 2% of employees might be in a same sex domestic partnership. This is much higher than the Census estimate, demonstrating the difficulty in coming up with reliable predictions for enrollment changes.

22. For a detailed study on the issues around workplace disclosure, see James D. Woods, The Corporate Closet: The Professional Life of Gay Men in America, New York: The Free Press, 1993. For survey evidence of workplace discrimination, see Lee Badgett, Colleen Donnelly, and Jennifer Kibbe, "Pervasive Patterns of Discrimination Against Lesbians and Gay Men: Evidence from Surveys Across the United States, "National Gay and Lesbian Task Force Policy Institute, 1992.

23. "The Report of the CUNY Study Group on Domestic Partnerships," Attachment E.

24. David J. Jefferson, "Family Matters," Wall Street Journal, March 18, 1994.

25. Kimberly Blanton, "To Insure, Not to Insure," The Boston Globe, 10/12/93, p. 39.

26. Interview with James Stascavage, 3/26/94, a staff member at Brown who was involved in the domestic partnership effort.

27. "Blue Cross Unit to Cover Couples Living Together," from Associated Press, in Dallas Morning News, from Domestic Partners Bulletin Board, 11/10/93.

28. "Kaiser Offers Benefits to Employees' Partners," San Francisco Chronicle, March 19, 1994, p. A23.

29. Roger Flaherty, "Gay Partners Get Equal Treatment; U. of C. Says Cost of Benefits is Negligible," Chicago Sun-Times, 6/26/93, p. 6.

30. John F. Harris, "Virginia College Faculty Urges Benefits for Gay Partners," The Washington Post, 1/28/94, p. B6.

31. Interview with Dean Cowmeadow.

32. In fact some officials admit that they are concerned about remaining competitive:

> "We welcome this decision as part of the University's long-term commitment to maintaining a strategically competitive benefits package," said William Holland, Penn's Vice President for Human Resources. Press Release, "Penn Trustees Approve Measure to Extend Employee Benefits to Same-Sex Domestic Partners." University of Pennsylvania, 12/10/93.

ROLES, REWARDS, AND RESPONSIBILITIES

E. MAKING IT WORK: SCHOLARSHIP, EMPLOYMENT, AND POWER IN THE ACADEMY

Michele Janette, Team Leader and Tamara Joseph, Chair
Graduate Employee Student Organization
Yale University

Yale, America's third wealthiest university, is in New Haven, America's seventh poorest city. Since Yale is New Haven's second largest employer, the town/gown division is also an employer/worker division. The Yale administration has long defined the "Yale Community" as those who live and study within its walls and gates: students and faculty. According to this definition, the three thousand New Haven residents employed by the university who provide clerical, technical, custodial and maintenance services are neither members of the Yale community nor essential to it. The Yale administration has repeatedly insisted that in the event of a strike by these workers, the university's essential academic activities ("business as usual") would be unaffected. This claim depends on an absolute distinction between Yale's academic functions and its role as an employer. GESO, a student and employee union, is founded on a refusal to define our position in the university as divided. We have located ourselves in the gap between some dearly held oppositions; between employer and employee, between intellectual and manual labor, between professional and 'working' classes, between students and teachers, between Yale and New Haven, between essential and inessential work.

We hope in this paper to describe the consequences that such a positioning has had in our formation -- how we have negotiated the combination of student and worker issues in our union and how GESO's alliance with other campus unions has strengthened and informed our organization. We hope further to suggest that the effort to create a union for graduate students and employees has necessarily led us to examine and challenge some of the university's inherent values.

The structures of graduate study tend to define us as individuals rather than constituting a basis for community. Isolation and an emphasis on individual identity and endeavor are prominent features of graduate existence. Pursuing our individual research projects, divided into different departments, and lacking the physical and social presence on campus which serves to define the undergraduate community, if we are to function as a community we must make a deliberate act of choice to do so.

But upon what basis do we choose this community? Graduate student identity differs from many of the categories which have formed the basis for other kinds of identity politics. Unlike race and gender identities, for example, the category 'graduate student' is not easily essentialized or naturalized. We inhabit our identity as graduate students temporarily and not, we hope, for life. Moreover, our professional identity is ambiguous and conflicted. We are teachers, writers, and researchers, doing the same work as faculty, but we are not professional academics. We are both students and teachers, producers and consumers in an academic environment. We are students all the time, teachers and employees only some of the time. Our collective identity is constituted by a shared structural relationship to an institution and a common set of practices, occupations, and experiences.

This conference addresses the question of how academic unions can or should respond to changes in the academy and especially to new political pressures and fiscal constraints. It was precisely such changes in the conditions of our lives that first led us to identify ourselves as a group. In the late '80s Yale implemented a series of new policies which reduced teaching opportunities, increased individual teaching loads, and established new rigid and arbitrary time-to-degree requirements. These changes were ostensibly designed to help graduate students to complete their degrees more quickly, but were informed by a desire to lead a national trend in the nature of graduate study and by a view of graduate students a mercenary malingerers.

At the same time, Yale developed a much vaunted, entirely fictional, and now forgotten "fiscal crisis," which was used both to intimidate Yale's unionized employees as they renegotiated their contracts amidst a spate of lay-offs and to justify a plan to "restructure" the university, a down-sizing of Yale that would eliminate, among other things, the entire departments of linguistics, sociology, and mechanical engineering. Both faculty and students felt that the recommendations of the Restructuring Committee, which were reached almost entirely without consultation, were inadequately justified and politically motivated. Graduate students perceived proposals to shrink the university, section size increases, a 25 percent decrease in the TA budget, cuts in library hours and services, and administrators' public statements on the uselessness of the humanities as various symptoms of a refashioning of the university which prioritized efficiency over complexity of academic inquiry, and profit over the material support of the people who conduct that inquiry.

As graduate students came together to fight the changes in our working conditions, we shared information, for example about our teaching experiences or our financial aid packages, and it became apparent that many situations which had previously seemed to be unique to or the fault of particular individuals were actually the result of systemic injustices.

Experiences and even emotions which seemed intensely personal had a collective and political dimension and were amenable to change at the collective level.

Students had perceived and treated the level of financial support they received as indicative of their value as scholars, and thus many kept their low level of support a secret. When students in the English Department made a conscious decision to share this information, many were surprised to discover that they were not uniquely underfunded in a department of highly valued scholars, but that there was a widespread and arbitrary dispersion of poverty. Low levels of support were not badges of individual inadequacy and shame, but instances of a common and general poverty resulting from the low valuation placed on graduate study as such.

Excessive teaching loads were another example of apparently personal difficulties which were revealed to be systemic. Graduate students were often asked to teach "a few extra" students as a personal favor to a professor, or as an odd sort of compliment, as if the assignment of extra work was a sign of respect for our competence. Because this increase in the teaching load happened in the independent, informal, unrecorded realm of individual courses, it again seemed an issue between individuals, a voluntary commitment made by single TA's, which they honored as a compact between themselves and their professors, and to which they had agreed. Again, as a collective we were able to see that the university in fact relies on the constant compacting between TA's and professors, which taken as a whole is not "a few extra students" but an enormous percentage of teaching that the university receives gratis. Our extra work was not an individual favor or mark of super efficiency, but a constant factor in the functioning of the university, whereby the slippage between what the university claimed to be doing in job descriptions, wage scales, or promotional literature and what the university practiced in job allocations, growing class sizes, and hourly compensations was rendered invisible, swallowed up in the "generosity" of graduate students who continued to give of ourselves. Collective action has meant publicly reclaiming our own sense of value, and requiring the university to take responsibility for unfair compensation practices.

Our fight with Yale has been a fight about what we are worth. As graduate students at Yale, we occupy a position of social and educational privilege. Despite our apparent position of cultural and economic power, however, we work full-time without making enough to live on. Graduate students acutely face the question which bedevils all academics, "What is the value of academic labor?" The fact is that it is extremely difficult to convince anyone that we and the work that we do have any value at all. We know that we work, and work hard, and we believe that our work is valuable, although it is not in an obvious sense productive. How do we argue, however, that it is valuable to someone else, to the extent that they should pay for it?

The attempt to make the university recognize the value of our work has led us to interrogate the different values given

BEST COPY AVAILABLE

to different kinds of work, for example to literary criticism, scientific research, university teaching, union organizing and manual labor. We began by seeking to de-mystify teaching, and insisting that it was not a sacred duty of ineffable value, but an activity which could be measured and described in the language of a job description. However, the very process of organizing for a strike led us to reclaim some of that mystification as we argued for the exceptional value of the labor to our own and to undergraduate experiences, the terms of debate shifted from quantifying our teaching as work to investing our teaching with meaning. We argued that class sizes and wages were important not only because they represented labor but because they made it possible to teach well. The question of whether our teaching was valuable enough to the university to pay for it became a question of whether it was valuable enough to us to strike for it.

The attempt to define teaching as our most concretely productive work also had the curious effect of devaluing our private research. The academic research of TA's in the humanities and social sciences, unlike the research of graduate students in the sciences and unlike the research of faculty in the humanities and social sciences, is not considered to be productive work that merits remuneration, but something more like recreation, self-indulgent self-development, or the acquisition of cultural capital or professional training which, like virtue, is its own reward. For graduate student teachers to define themselves as university employees may have been a radical assault on the distinction between the 'real mission' of the university and the 'inessential' work of its employees, but it conceded a distinction between our academic research and 'real' work with a market value, like teaching, intensifying the struggle to valorize the academic work that we do.

Our union was formed at a moment when Yale was grappling with such issues of value, not just in terms of the value of our labor, but in the context of reshaping what a university is and what graduate education is. GESO addresses these issues as both employees and students. Our platform includes improvements in library access, health care coverage, registration and grievance procedures, as well as job descriptions, wages, and contracts. Our mission statements are broad, encompassing our different relationships to the university, and allowing us to engage the university's roles as employer, place of learning, and "corporate citizen." It is because we care about what kind of university Yale will be, about what the future terms of graduate study in our university will be, about what kind of community Yale will create for all its employees and students, and about what kind of role it will play in the city of New Haven, that we have decided to form a union.

Precisely because this is perceived to be a moment of crisis, or at least of change, in higher education, we feel that graduate students need an institutionally recognized structure of participation in university decision-making. Yale's model of governance is profoundly anti-democratic, but also institutionalizes many of the values of the academy. Liberal academia places a high value on original, individual, and specialized thought and expertise, a value which we share. This often seems to lead, however, to a sense that democratically achieved decisions are necessarily inferior to decisions made by experts. Any form of collectivity or standardization is perceived as a threat to this highly valued individuality, or as providing crude blanket panaceas inappropriate to individual concerns. Yale's custodial model of governance is based on these suspicions. It entrusts the running of Yale to individual deans. It is characterized by unwritten and therefore malleable rules and a reliance upon individual personal relationships. This vision of academic community appears to liberate scholars from the arduous business of governance, leaving them free to pursue their academic research. In practice, however, this model produces a dictatorship only sporadically benevolent. Flexible rules mean that policies can be changed midstream and without consultation. Unwritten agreements mean no guarantees. Reliance on personal relationships creates an infantilizing sense of dependency. An emphasis on individuality means that students feel personally responsible for being underpaid and undervalued.

We have espoused the university's ideals of academic excellence and intellectual freedom, and at the same time insisted on a definition of those terms very different from the university's. As the institution has argued for a structure of centralized control, private negotiation, and unwritten understandings to achieve these ideals, GESO has insisted that the same goals would be better achieved through collective bargaining, contractual agreements, and self-governance. The union model combines the principles of participation, power, and accountability we deem important not only as a means of getting the administration's attention, but as the underlying principles which should inform Yale's future shaping.

Our faculty had disappointingly little to teach us about alternative models of successful participation in university governance. Although some claimed that the faculty exercised enormous indirect influence, most faculty members simply told us that since the faculty had no power, graduate students should content themselves with none as well. In this context, Yale's existing labor unions became our teachers and mentors, advising, counselling and supporting our organizing efforts. From them we learned models of communication, responsibility, community building, leadership, and practical democracy.

Local 34, Yale's clerical and technical workers union, structured itself around existing connections between members, rather than around central convenience. Union leaders recruited from the membership a large number of "organizers" who would have frequent and informal discussions with the members they worked with, discovering their concerns and needs. The organizers then met together to develop goals and strategies from their constituents' ideas, always in contact with members as these strategies took shape. Since success depended on widespread participation, organizers sought to be as inclusive as possible in planning actions as well as in carrying them out. So organizers were recruited not only according to location of workplace, for example, but to reflect networks of friendship, religion, community, ethnic background, and any other connection organizers could find to encourage members to feel that the union was indeed their organization, and honestly reflected their concerns. The resulting solidarity, trust, and participation of Local 34 members made their union a national model.

GESO organized itself similarly, seeking organizers in academic departments, minority and international student associations, dorms, laboratories, and student-run organizations. We sought a ratio of one organizer for every five members to ensure that substantial and frequent conversations could take place. As it became apparent that this would produce an unwieldy committee for strategizing, we developed the coordinating committee, with each coordinator representing and responsible to 5-10 organizers. This committee compares concerns from different areas of campus and develops overall strategies.

GESO has exposed and challenged the university's institutionalized assault on democratic principles by engaging in active and practical democracy, creating and proving the value of democratic power structures both within the university and within our own organization. In practical terms, we interpret democracy as meaning the distribution of power amongst the largest possible number of people. Democracy, as GESO enacts it, is not simply a question of representation for two reasons. First, because having our concerns articulated is not enough -- however much we *say* why we deserve better conditions in which to work and study, that expression alone does not get anything changed. And secondly because representative models of democracy necessarily imply the delegation of power and responsibility -- that once you have cast your vote for your representative, you can then return to your daily life and assume that your representative will take care of things for you. Democracy for us has meant forging a community which has shared goals and understandings, and mobilizing that community to act collectively. In GESO, democracy means participating in shaping our organization and acting to achieve our common goals. GESO has demonstrated that by acting collectively, we can take power from the university administration and transfer it to the graduate community.

The alliance between GESO and the two existing unions of clerical and technical (Local 34), and service and maintenance workers (Local 35) has achieved much in its four years. Both unions won unexpectedly good contract settlements two years ago. GESO, while still officially unrecognized, has made many gains, including student participation on the Graduate School Executive Committee, the repeal of rigid restrictions on degree progress, extended library privileges, reduced class sizes, a paid teacher training program run by graduate students, and a 28% salary raise for the most common teaching appointment. It has not only created an active and powerful graduate student community, but has also transformed the way in which many of us understand our place in the broader communities of Yale and New Haven.

By assuming the right of Yale's employees to make the university itself an object of critical evaluation, the tri-local alliance also reserves a long history in which New Haven's urban problems have served as case studies for Yale academics. We have argued that Yale's employees have a better theoretical and practical understanding of the university as an institution than its faculty and administration, and that they have something to teach the rest of the community, particularly about democratic participation in a university setting.

We are, we admit, particularly proud of our alliance with the other two local unions on our campus, an alliance which is unique among graduate student unions. It is quite literally, one of our greatest sources of strength, not only in terms of advice, experience, and resources, but in the fact that the allied graduate students, groundskeepers, dinning hall workers, maintenance staff, office staff, and technical assistants could without question stop the university from functioning. It is a solidarity which impacts every aspect of university life: teaching, studying, eating, communicating, staying warm, and getting home safely. The invisible web connecting these aspects of campus is rendered visible through the tri-local alliance. As exciting as the power and leverage this gives us is the conceptual impact the alliance has on the way we perceive Yale. The cooperation between the three unions has permanently breached some of the visible barriers of class, race, and gender between the different groups of employees on campus. Like the GESO community, the tri-local community is not based solely on ideas, but on the physical reality of having marched and yelled together, of learning the names of people whom we have learned not to see, of developing strategies together, and of knowing we are willing to take risks for one another.

When Local 35, a union predominantly made up of African-American and Italian-American men, worked to organize Local 34, made up mostly of mentors for unionizing graduate students, the hierarchy of cultural capital was reversed. This connection bridged a chasm the university administration had long insisted upon: the gap between the "essential", academic functions of the university, and the simply "supportive" services other workers provide. Such a conjunction challenged the validity either of substituting cultural capital for the material compensation of graduate student teachers, or of supposing that "workers" had no connection to the educational mission of the university. The tri-local alliance allows us to talk very concretely about universities as institutions in a community, forcing us to think about being an academic in a more socially responsible and interconnected way.

To sum up, we have tried to flesh out what GESO is and where it came from, but frankly, it is all on the membership card. In signing the membership card, each member of GESO makes a commitment:

1. To protect, promote and advance the interests of graduate students at Yale University, and to uphold the dignity of our work and scholar-

ship. To ensure that the university provides the resources and services necessary to our work. To ensure the continued excellence teaching and research at Yale.

2. To ensure that graduate students have an active role in the university's decision-making processes that affect graduate student life.

3. To maintain the vision, leadership, and organization necessary to be an effective, democratic and united organ-ization.

4. To inform a union in affiliation with Locals 34 and 35, Federation of University Employees, affiliated with the Hotel Employees International Union.

5. To join with other students, faculty and workers at Yale, and with the greater New Haven community, to promote justice at Yale and to encourage the university to be a good citizen of the community.

6. To fight against racism, sexism, homophobia and other forms of discrimination at Yale University.

The conditions of graduate study place graduate students in a vice between the ideals of academic excellence and the material reality which fails to support such ideals. We offer GESO as one imperfect but successful model for academic activism, one which despite failures and flaws has brought about changes in the material conditions of our lives and in the self-conception of the university community.

ROLES, REWARDS, AND RESPONSIBILITIES

F. WORKERS/TEACHERS/STUDENTS: GRADUATE STUDENT EMPLOYEE COLLECTIVE BARGAINING AT THE UNIVERSITY OF MICHIGAN

Jon Curtiss, Vice President
Graduate Employee Organization
University of Michigan

INTRODUCTION

My title is a kind of slogan for GEO, the union of Teaching and Staff Assistants at the University of Michigan, and it seeks to articulate the way in which our lives in the university are marked by multiple roles. We walk into some classrooms as teachers, others as students; one day we find a paycheck in our mailboxes, the next we find a bill for tuition. These multiple roles make our place in the university complex, and at times the demands and responsibilities they place on us can be difficult to negotiate. We have, for example, a complicated relationship with professors and administrators -- who also must play multiple roles; they are our teachers in the classroom, our dissertation advisors once we reach candidacy, and our employment supervisors when we work as Teaching Assistants (TAs).[1]

When no clear boundary exists between these roles, graduate student employees can be easily exploited. Many professors, for example, are unfamiliar and uneasy with the role of employment supervisor, and treat their TAs as "students" to whom they give assignments. As a TA in such a situatiion, I may find myself falling into the student role, working to please "my professor" and forgetting to ask some basic questions: "Am I being compensated fairly for this work?" What can I do if I'm not?" It is a recurring problem and TAs can be doubly intimidated if the distinction between worker and student is not clear. Imagine filing a complaint about the professor you work for when you know they sit on the committee that makes fellowship decisions; imagine questioning hiring policies when you are taking prelims.

A graduate student employee labor organization is thus about distinguishing precisely among these roles, establishing unambiguously our status as employees and teachers in the university, and using our collective strength to ensure fair compensation for the work we do. A graduate employee union clarifies the relationship between TA and professor. It separates the employer/employee relationship from the advisor/student relationship (which can be murky, sensitive, and political), and spells out clearly the rights and responsibilities of both parties.

In securing their collective bargaining rights, however, graduate student employees thus face a double battle. Not only must they organize and achieve a successful recognition election -- meeting the usual resistance from the confrontations with their employers -- but, once successful, they invariably find themselves in court having to prove that they are in fact employees. University Administrations have been quick to argue that Teaching Assistants (and other graduate student employees) are primarily students who are provided a financial aid package and receive a stipend; they are thus, so the argument goes, mot employees and consequently cannot legally secure the right to collective bargaining. Graduate student employees have found themselves countering with an argument that seems patent: yes, we are students, but the work we do teaching classes, grading papers, educating and mentoring our students is a job for which we are paid a salary. As such, we have the right to representation and a union contract.

Like any other union, a graduate student employee union is about many things. It is about establishing a certain amount of control over the economic factors that affect our lives: salaries, benefits, and working conditions; it is also about a commitment to democracy, education, and social justice. In some sense, however, it is most importantly about taking pride in the work we do. When we claim our rights as employees, we are effectively articulating that our teaching is a professional responsibility and that we take our jobs as educators seriously. Without this articulation (to ourselves and our students, as well as to our employers), we risk the danger of allowing teaching to become simply a necessary task that functions only to support the "more important" work of scholarly research. As graduate students, the pressure to let our teaching take a back seat is strong; "there is little incentive, other than personal pride," concludes the UM Planning Committee on the Undergraduate Experience, "for graduate students to excel in the time-consuming tasks of teaching when pressures are increasing for them to complete their degrees rapidly." Sometimes we hear it explicitly from our advisors and department chairs: "don't worry about teaching too much." More often, the pressure is implicit: our low salaries tell us our work is not valuable; our heavy workloads tell us not to give individual attention to students; and curtailed funding tells us to spend less time teaching, more time hurrying to finish our dissertations. Even the title "Teaching Assistant" implies, inaccurately, that what we do is secondary and supplementary.

At the University of Michigan, TAs teach 30 to 40 percent of undergraduate class hours primarily in discussion sections of large introductory classes. We thus perform the crucial job of introducing undergraduates to the key concepts and conventions of academic disciplines. In some departments, TAs are solely responsible for the content and teaching of fundamental courses. (As a TA in the English department, for example, I have designed and taught introductory courses in composition, poetry, and prose fiction, as well as upper-level courses in both writing and literature.) Frequently, undergraduates find regular faculty unavailable and form their most rewarding student/teacher relationships with TAs. A union gives us a place to encourage the "personal pride" we take in our teaching; it gives us a voice to claim the value of our work; and it gives us the power to make sure that voice is heard.

GEO: A BRIEF HISTORY

The Graduate Employees Organization (AFT Local 3550) is the union of Teaching and Staff Assistants at the University of Michigan, and represents approximately 1,700 college-level instructors. The double battle to unionize and to be recognized as employees occupied graduate student employees at the University of Michigan -- from the earliest efforts to organize to the final legal decision on the student/worker distinction -- for more than ten years. Teaching Fellows (as they were then called) first began to organize in 1970, when the University Teaching Fellows' Union filed for recognition by the Michigan Employment Relations Commission (MERC). In the same year, Political Science TFs walked out on their discussion sections to protest departmental cuts to TF allocations. In 1971, however, MERC denied the petition, ruling that TFs alone did not constitute an appropriate collective bargaining unit. While MERC did not offer an opinion on the student/employee distinction, it agreed with the University administration's argument that even if TFs were employees, they should be part of a unit that included Research and Staff Assistants; no election was conducted.

A number of administrative decisions in the summer of 1973 sparked a second organizing drive. Following a student strike to protest a 24 percent tuition increase, Teaching Fellows formed the Organization of Teaching Fellows (OFT) to protest the increase -- as well as the loss of TFs' in-state tuition status, new residency requirements, and a low pay increase. OFT, loosely associated with the AAUP, attempted to begin negotiations with president Robben Fleming, but were rebuffed; the administration would not bargain unless OFT were officially recognized by MERC. Discussions of a possible strike were well underway when the University administration suddenly discovered a $3.75 million budget overflow -- and then announced that this surplus would be used to grant a sizable pay increase to Teaching Fellows. TFs subsequently failed to authorize a strike, but continued their organizing efforts. They joined Research and Staff Assistants to form the Graduate Employees Organization (GEO), and demanded recognition as the sole bargaining agent for all Graduate Student Assistants (by this time, the administration was referring to TFs as "Teaching Assistants"). This time the administration agreed to an immediate MERC certification election, and, after an overwhelming vote, GEO was officially certified on April 15, 1974, thus forming the second graduate student employee union in U.S. history.[2]

Negotiations for a first contract began in June and proceeded slowly. After months of bargaining and state mediation failed to yield results, GEO offered to go to binding arbitration. The administration declined. With all avenues of negotiation exhausted, the union membership voted to initiate what would become a month-long strike. As the strike began on February 11, 1975, more that 50 percent of undergraduates boycotted classes, and Michigan's Teamster locals instructed their members not to drive trucks through picket lines. The strike was a success, producing agreements on wage increases, paid benefits, agency shop, non-discrimination (including sexual orientation, despite one Regent's notorious homophobia), and affirmative action. GEO's first contract was signed and took effect on March 14, 1975.

All these events took place, of course, in a period of heightened political awareness and intense student activism. The Political Science walkout of 1970 happened in the same year that the Black Action Movement drew 500 people to an open forum on increasing minority admissions and led a successful student strike; 2000 people marched against the conviction of members of the Chicago Seven; and 107 students were arrested during a protest for a student-controlled bookstore (it was also the year student anti-war protesters were shot at Kent State and Jackson State -- a moment when the university campus suddenly seemed a militarized zone of conflict and violence). During the GEO strike of 1975, 250 members of the Third World Coalition Council occupied the main Administration building for three days and demanded increased recruitment of students and faculty of color, minority advocate positions, and recognition as a collective bargaining agent. In the spring, Henry Kissinger declined an invitation to speak at commencement when threatened with a large protest.

After much thought and debate, GEO voted to affiliate with the American Federation of Teachers (AFT), and preparations for bargaining a second contract began. During negotiations, GEO suffered from organizational problems, and weakened itself by a failed strike vote. Instead of capitalizing on their strategic advantage, however, the administration demanded that GEO drop two pending grievances. As this would have undermined the contractual right to due process, GEO filed an Unfair Labor Practice complaint. In turn, the University responded that they could not commit an Unfair Labor Practice, because GSAs were not really employees and thus were not covered by the rules of collective bargaining. These positions led the administration and the union into a long round of court battles.

In August, 1977, MERC administrative law judge Shlomo Sperka ruled in favor of GEO, affirming the right of student employees to bargain collectively. While the decision forced the University to recognize Teaching and Staff Assistants as employees, it excluded Research Assistants from the bargaining unit on the grounds that their work was "directly related to educational goals;" they were students, not workers. A long series of appeals ensued, ending in November 1981. After losing their last appeal, the administration finally signed the 1976 contract on November 23, 1981.

GEO made significant headway in contracts signed in 1983, 1985, and 1986, convincing the administration to discuss tuittion and salary as part of the same package and to require departments to offer TA training. We gained formal recognition of affirmative action, extended the period of eligibility for dental coverage, and won significant raises in both salary and tuition waivers. In 1987, negotiations were greatly complicated by the new tax bill passed by Congress, which lowered tax rates for high income brackets, but compensated with a great increase in taxes for students receiving tuition waivers. Most TAs stood to lose between $800 and $1500 per year. As negotiations ground on into mediation, GEO prepared to strike. Faced with this prospect, University negotiators gave in almost immediately, offering a 22 percent increase in tuition waiver -- the largest increase in spending on TAs in its history. Currently, TAs who work quarter-time or more receive a full tuition waiver. More recently, in 1991, we successfully bargainined for partial tuition waivers for TAs with low employment assignments.

In 1993, we found ourselves defending againist a cut in our benefits package. For some time, many graduate students had been turning down prestigious fellowships (which came with little or no health insurance), and choosing, instead, to teach under a union contract that guarantees good benefits. So the administration developed a new benefit plan for fellowship students called "GradCare;" they wanted to pay for it by convincing the union to take it as well. Not only would GradCare have provided worse coverage, it also had serious political implications. The switch from a benefit package we share with faculty to a package "designed for students," would have endangered that crucial distinction between our employment as teachers and our status as students. Membership mobilization against this effective cut in benefits was adamant; an 87 percent "yes" vote authorized the Steering Committee to call a strike, and the administration acquiesced. Membership support for other issues was less strong, however, and we now have a three-year contract, with a 3 percent raise in each year.

CURRENT ISSUES: WORKING FOR A LIVING WAGE; IMPROVING TA TRAINING; FIGHTING DISCRIMINATION

In 1994, economic concerns are still a priority. Currently, the average TA at the University of Michigan does not make enough to meet living expenses. For most, living alone or owning a car is an affordable "luxury" -- never mind supporting a family. Many of us have to take extra jobs that take important time away from our teaching and our scholarly work; consequently, we take longer to complete our degrees and many of us drop out. The basic figures are simple: in 1992-93, the mean monthly salary for a TA at the University was $729 -- after taxes, fees, and dues; the University Office of Financial Aid's calculation of monthly living expenses for a graduate student was $839. In real terms, over the previous nine years, TA wages had remained constant, while the basic costs of living had increased dramatically. (Since 1983, the full-time equivalent salary had actually dropped slightly, 0.6 percent, while housing, our largest expense, had risen 12 or

13 percent. Graduate student employees were spending a larger and larger proportion of their monthly take-home pay to cover rent, utilities, books, and other fundamental needs.

A living wage is not only necessary for TAs' financial health and general well-being, however. It would also have an extremely beneficial effect on graduate program times-to-degree and attrition rates, which are very sensitive to financial support. This makes sense: if we do not make enough to make ends meet, we have to take second jobs; we then have less time to work on our dissertations. Speaking to Congress in 1990, Dean John D'Arms (Dean of the UM Rackham School of Graduate Studies) had this to say about graduate students who cannot afford living expenses:

> Nonacademic employment takes students out of their programs, resulting in lost time for carrying out dissertation research and completing the doctoral program. Some students are compelled to drop out of school altogether; although these students intend to save sufficient funds to return and complete their dissertations, a substantial percentage of them become locked into circumstances of employment and family that preclude returning to complete their degrees. That is a regrettable -- and preventable -- loss to students and society. (US Senate, 214)

By paying us a living wage, the University will allow more students to finish their degrees and will let them do it faster.

At a time when economists and policy analysts continue to predict a shortage of job market Ph.D's (although if you are on or close to the job market, this sounds more like a fantasy than a prediction), the support of graduate students is important to the future of education in this country. Ehrenherg and Mavros indicate that a Ph.D shortage is very likely to hit the country in the late 1990's because:

> ...college graduates are much less likely to receive doctorates today than they were 20 years ago. Two important factors in this decline may be the increase in the length of time necessary for doctorate students to complete their programs ... and the low completion rates of entrants into doctoral programs. Both factors discourage doctoral study (Ehrenberg & Mavros, preface).

In 1968, the median time to complete a Ph.D was 8.1 years; in 1988, it was 10.5 years (National Research Council, Table 1). Departments with 65 percent completion rates now experience 55 percent rates (Ehrenberg & Mavros, Table 2). A living wage for graduate student employees (as welll as increased graduate student funding), by increasing times-to-degree and lowering attrition rates, may well help alleviate a crisis in higher education (see D'Arms).

A second issue that concerns us is the quality of our teaching; more specifically, we believe that the University's ostensible commitment to undergraduate education requires a stronger commitment to TA training. Training was only provided to all Teaching Assistants at the University of Michigan after 1987, when it became required by the GEO contract. Before that date, it was not uncommon for graduate students to find themselves as first-time Teaching Assistants facing a class of undergraduates with little or no direction from their departments. (This continues to happen at non-unionized schools.) Presently, although we are fortunate to have some valuable resources in the UM Center for Research on Learning and Teaching, most of us are still dissatisfied with the quality of the training we receive. We have been unabel to convince the administration that training should be paid time, and that more comprehensive training at departmental levels is necessasy to fully support TAs in what for many of them is the initiation into a career. First-time TAs frequently find themselves disempowered, unable to maintain a sense of confidence in the classroom and, thus, unable to provide a fully successful learning environment.

A third issue that continues to concern GEO is discrimination. The demorgraphics of our bargaining unit are virtually identical to what they were in 1979, with the exception of significant increases in the percentage of Asian-American and Asian (non-citizen) TAs. Currently, there are only 64 African-American TAs at the University of Michigan, or 3.6 percent of our bargaining unit. Asian-Americans comprise 3.2 percent, Native Americans 0.3 percent, and Hispanic/Latino TAs 2.5 percent. Increasing the number of TAs of color would provide crucial teaching experience for graduate students of color in an extremely competitive job market. It is also important for undergraduates to have more teachers of color to act as mentors and authority figures. TAs of color also face discrimination in the classroom -- as do women, gay, lesbian, and bisexual TAs. The difficulties of the first-time TA are doubly compounded when inflected by racism, sexism, and homophobia, and GEO is currently strategizing about how we can act as an advocate in these situations.

These issues concern us at a time when many members of the University administration seem increasingly enamored of management philosophies drawn from the corporate world (although it is important to note that not all administrators share this faith). "M-Quality," the administration's plan for "Total Quality Management" at the University of Michigan, relies on the economic metaphor of consumption for the work of teaching and learning. In its report Enhancing Quality in an Era of Resource Constraints, the University's Task Force on Costs in Higher Education (chaired by Provost Gilbert R. Whitaker) concludes that:

> ...quality is in part defined in terms of the University's "customers." We believe that quality can be improved by developing a mature understanding of the University's customer needs and expectations .... Our customers are both internal (our students, faculty, staff, and other "units") and external (propespective students, parents, taxpayers, research sponsors and peer academics around the world).

BEST COPY AVAILABLE

It is certainly true that the University is organized around a set of economic relationships. Articulating, understanding, and helping to determine those relationships is perhaps the primary task of a graduate employee labor organization. When the metaphor of consumerism becomes hegemonic, however, it can interfere with and override other sets of relationships. The report, for example, suggests that one way to improve quality in the classroom is to reconsider the hasty conclusion that smaller classes mean better education. Might smaller classes be inferior, the report asks, "to large classes taught by faculty who are highly competent at this form of teaching?"

Similarly, The Michigan Mandate, the University's plan to create "a campus community recognized for its racial and ethnic diversity" (i), is explicitly based on a corporate understanding of multiculturalism:

> Planning models for institutional change necessary to become a genuinely pluralistic, multicultural community are still difficult to find. However, we were fortunate to be able to draw on the expertise of faculty colleagues with experience in other arenas, particularly in the corporate world, where significant cultural changes in the workplace have been achieved, using strategic approaches and techniques. A small group of advisors with first-hand corporate experience was assembled to help forge the first outlines of the Michigan Mandate.

This "corporate experience" leads to conclusions consistent with corporate aims: "Embracing and *even more importantly*, capitalizing on our racial, cultural, and ethnic diversity will be a critical element of the University's ability to achieve excellence in teaching and research while serving our state, nation, and world in the years ahead (emphasis mine). This is a natural (and disturbing) conclusion to the logic of customer service. "Racial, cultural, and ethnic diversity" have become part of the commodity we produce in "serving" the "customers" of a new international ecomomy. "Embracing" racial justice for its own sake takes a back seat to "capitalizing" on diversity. As Marlon Ross, writing about the Task Force report, observes:

> Not only is the process of operating the university to be thought of as market consumption, but also the process of education itself becomes purely commodified....Academic units must be judged according to their cost-effectiveness, which included especially their capacity to attract customer-students and outside customer-donors, as well as their intellectual flexibility in creating serviceable programs. Although the report does not present a "hit list" of programs, it is easy to predict the kind of programs that will be hit hardest, and it is clear that any program that can attach itself to the university's crossdisciplinary internationalization drive and its attendant aim of attracting more students from the population belts

(the West Coast, developing countries, and "minorities") will be handsomely rewarded. As Robert Weisbuch, a dissenting member of the Whitaker task force, has expressed it: this means that the university is substituting the means (a more cost-effective institution) for the end (better education).

Ross's argument is cogent. While I admire and support a commitment to quality education and cultural diversity, I am distressed when such a commitment can express itself only through the rhetoric of profit, the logic and language of customer service. My job is not to "satisfy" my students by handing them the commodity of knowledge, but to challenge them. (In a certain sense, I encourage them to be dissatisfied -- not simply skeptical, but willing to make personal and political commitments, willing to make a difference in the world.) Indeed, most of my students are wise enough not to be "satisfied" with prepackaged education; they understand that education is not simply an economic exchange, and that satisfaction is not simply about possession.

The solution is not to long -- as some might think -- for a student/teacher relationship that somehow takes place "outside" the economic sphere, but to seeks to participate -- through collective action -- in making the economic decisions that shape the university.

CONCLUSION

GEO thus has two current goals. The first is to improve the wages, benefits, and working conditions of the employees we represent through contract negotiations and grievances. In doing so, we assert the value of our teaching and encourage the University to take on the responsibility of providing a living wage to employees who make up a third of its teaching staff. Our second goal is to take an active role in shaping the institution in which we play so vital a part by emphasizing the need to combine a commitment to education with a commitment to social justice. While a union functions well in defining and protecting the rights of the most marginalized class of teachers in higher education, we have yet to be invited to participate fully in the decisions that determine the university's priorities and its purpose.

ENDNOTES

1. In this paper, I tend to use the terms "graduate employee" and "TA" interchangeably, for reasons that have to do with the composition of the GEO bargaining unit (which is composed of 97 percent TAs and 3 percent Staff Assistants). Graduate student employee unions at other universities have different compositions; see Lanzerotti, et al.

2. The first was the Teaching Assistants' Association (AFT Local 3220) at the University of Wisconsin, Madison, which was recognized in 1969.

BIBLIOGRAPHY

Ehrenberg, Ronald G., and Panagiotis G. Mavros. 1992. Do Doctoral Students' Financial Support Patterns Affect their Times-to-Degree and Completion Rates? School of Industrial and Labor Relations, Cornell University: Ithaca, NY.

D'Arms, John H. "Universities Must Lead the Effort to Avert Impending National Shortages of Ph.D.'s." Chronicle of Higher Education 17 January 1990: B1+.

Lanzerotti, Rachel, Melissa Hayes, and Jon Curtiss. 1994. Directory of Graduate Employee Bargaining Agents and Organizations. National Center for the Study of Collective Bargaining in Higher Education and the Professions, Baruch College, CUNY: New York (forthcoming).

National Research Council. Summary Report 1988: Doctorate Recipients from United State Universities. 1989. National Academy Press: Washington, DC.

Marlon Ross, "Contingent Predilections: The Newest Historicisms and the Question of Method." 1990. Centennial Review 34.

The Michigan Mandate: A Strategic Linking of Academic Excellence and Social Diversity. 1990. Draft 6.0. Ann Arbor: University of Michigan.

United State Senate. Hearing before the Subcommittee on Education, Arts and Humanities of the Committee on Labor and Human Resources. Washington: GPO, 1990.

University of Michigan Planning Committee on the Undergraduate Experience. A Michigan Education: The Challenges of Undergraduate Education at the University of Michigan. 1990. Ann Arbor: University of Michigan.

University of Michigan Task Force on Costs in Higher Education. "Enhancing Quality in an Era of Resource Constraints." 1990. Ann Arbor: University of Michigan.

V. LABOR LAW REFORM

- A. The Need for Law Reform
- B. Some Key Differences Between U.S. and Canada Labor Law

LABOR LAW REFORM

A. THE NEED FOR LABOR LAW REFORM

Julius (Jack) Getman, Professor
University of Texas School of Law

A. LAW REFORM IN THE ORGANIZING CONTEXT

The most important question in U.S. labor relations is why private sector unions represent so small a proportion of the work force. It was once widely assumed that collective bargaining between unions and employers would be the primary technique for establishing wages and working conditions in the private sector. Where collective bargaining has been seriously employed, it has made impressive positive contributions to our society. Nevertheless, private sector unions have had little success in organizing in recent years. Some of the reasons such as the changing nature of the economy and the loss of industrial base are only tangentially related to the law. Unions also bare some of the responsibility for their lack of organizing success. For a long time they spent too little money on organizing and routinely assigned their least effective staff people to the task. Management on the other hand was prepared to spend a great deal of money to move facilities, meet union wage scales in non-union facilities, and hire lawyers and consultants to run anti-union campaigns.

In addition, our existing legal system has in a variety of ways made the task of union organizing more difficult. It has increased the natural advantage that accrues to employers seeking to avoid unionization. I will suggest a few changes in the law that I believe would further the goal of a truly free choice by employees.

1. Unions Should Be Given Freer Access to Employees and the Right to Respond to Employer Speeches and Meetings.

In the mid 1950s the Supreme Court in NLRB v. United Steelworkers held that employers can make captive audience speeches, opposing unionization, to their employees without granting the union a right to respond. It also held in NLRB v. Babcock & Wilcox Co. that an employer has the right to "post his property against non-employee distribution of union literature," without demonstrating that such a prohibition was necessary for business reasons. The Supreme Court recently strengthened this prohibition in Lechmere, Inc. v. NLRB. In that case, the court held that the Board did not have the authority under the Act to balance the section seven rights of employees against the property rights of employers to determine whether to grant non-employee union representatives limited access to employer's property.

The prohibition against granting a union the right to reply to a captive audience speech is not so absolute. The Court suggested in the Neutone case that the Board might come to a different conclusion where it felt that a serious imbalance in organizing opportunity was created. The Court did not suggest how the Board was to measure whether an appropriate balance existed. The Board has responded by assuming that no imbalance exists whenever the union has some ability to reach employees by telephone, mail or meetings. Together court and Board decisions have established a policy favoring property rights over the ability of employees to become informed about the arguments favoring unionization.

During the pre-election campaign, employers and their outside consultants have the ability to call the employees together, during what would normally be working time, and state the case against unions. They can also engage in one-on-one meetings with employees during the work day. The union, by contrast, is limited to voluntary meetings away from the job site and solicitation by employees during non-working times. It is only in the rarest circumstances that unions are permitted to respond to captive audience speeches or that union organizers are granted even limited right of access to the employer's premises. However, the assumption of rough equality of organizational opportunity on which the law purports to rest is factually incorrect. The study of organizing campaigns that I conducted together with Professors Goldberg and Brett revealed that the current system gives employers a definite advantage in getting their message to the employees during a formal campaign. Employers have an even greater superiority of access prior to the formal campaign.

The current system makes it easy for an employer to run a campaign against the individual union organizers. These campaigns are quite common, and they respond to real employee concerns. The personality and dedication of organizers is always a matter of concern to employees trying to decide on unionization. Even employees favorable to unionization are frequently troubled by the picture of the particular organizer and union, as exclusively drawn by the employer. At present, the organizer can only overcome this with those employees willing to come to a meeting or meet with the organizer off the premises not during working hours.

Representation campaigns would more likely reflect the employees' choice, if unions had a right to respond to employer speeches and meetings, and if union organizers had access to the employees, subject to reasonable labor board regulation. Such a system would also demonstrate to employees the law's ability to change the employer's absolute control over their jobs and working conditions.

2. Remedies Intended to Punish and Deter Illegal Behavior Should be Permitted Under the NLRA

Under current law remedies imposed by the Board for unfair labor practices must be for the sole purpose of undoing the effect of specific illegal actions. This means that access remedies are almost never granted and that the penalty for discriminatory discharges is generally limited to reinstatement and back pay, a cost that many employers are willing to pay for the benefits that they think likely to flow from employee fear of unionization. Studies suggest that reinstated workers rarely return for any length of time to the jobs from which they were discharged.

In deciding whether to issue a bargaining order under current law, the Board must determine "the possibility of erasing the effects of past practices and of ensuring a fair election...by the use of traditional remedies..." This standard forces the Board to make uniform judgments about the likely impact of unfair labor practices, and of the effectiveness of remedies, on voter behavior. It is not surprising that Board bargaining order decisions inevitably reflect efforts to punish and deter. In part this is because the Board's "traditional" remedies are so weak that they are most unlikely to deter campaign violations or encourage obedience to the law. However, given the reviewing standard that limits the Board to undoing the impact of unlawful behavior in particular cases, and the fact that bargaining orders may serve to override rather than to protect free choice, it is not surprising that reviewing Courts frequently set aside Board bargaining orders.

It would better serve the policies of the Act if the Board could impose remedies designed to punish employers who intentionally commit what are legislatively determined to be serious unfair labor practices, such as discriminatory discharges or bargaining with a view to eliminating a union. If a system of treble damages, injunctions, and loss of government contracts were developed, adherence to the law would likely be given a far higher priority by employers than it currently is. Where employers bargain with a view to not reaching agreement, but to rid themselves of a union, the Board should be able to impose a settlement that will include the imposition of an agreement.

3. Faculty Members in Private Sector Colleges and Universities Should Have the Right to Choose Unionization

In the Yeshiva case, the Supreme Court concluded that faculty in "mature" colleges and universities are managers under the Act who do not need the right of free choice with regard to unionization, because their interests and those of the administration are the same. Since that decision, the great majority of faculty at private universities have been denied the right to choose representation. The conclusion that faculty are managers at any university with a committee structure of any significance reflects a monumental misunderstanding of the conditions of faculty employment at many institutions of higher education. During my period as President of the American Association of University Professors, I had the opportunity to visit a variety of campuses around the country. The reality of academic life in many places bore little resemblance to the ideal picture drawn by the Court in its Yeshiva decision.

The Yeshiva decision has the remarkable effect of declaring all faculty in most institutions to be "managers" because of the administrative role of a few. If this approach were applied to other sectors of the economy, it would deny representation rights to many employees and provide employers with a simple technique for avoiding unionization. The Yeshiva decision endangers labor management cooperative programs that adopt committee structures similar to those common in academic institutions. Unions that favor such programs might be bargaining their members out of the Act's protection.

4. Binding Arbitration Should be Available Where Impasse is Reached During First Contract Negotiations

It is a sensible policy to keep the government's role in collective bargaining limited. However, this policy has led the Board and courts to give an unnecessarily limited scope to the duty to bargain. After a successful organizing campaign, employers are too often able to use the bargaining process to avoid agreement. A well-counseled employer can usually bargain in this way without being found guilty of violating the Act. Even if a refusal to bargain is found, no effective remedy is imposed. We have learned from the public sector that using some form of arbitration to resolve disputes in such situations does not interfere with the bargaining process to the extent previously assumed. The risks to free collective bargaining from surface bargaining are greater than the risks from alternate dispute resolution techniques, such as binding arbitration or more effective Board remedies.

The current system distorts free choice in two ways. Some employees who formally choose representation are denied true collective bargaining; other employees may decide that voting for representation or otherwise supporting a union will be a futile act that may cause the employee trouble, but is unlikely to lead to positive results. An employee, otherwise favorable to unions, with a realistic understanding of the risks posed by current law, could well decide to vote "no" in a representation election. If an effective alternative such as first contract arbitration were an option, employers would be more likely to bargain in good faith so that collective bargaining would work without government involvement, and unions would do far better in representation elections.

5. The Election Process Should be Speeded Up

Shortening the time between petition and election could substantially reduce the advantage that the formal campaign gives to employers. Under current law an employer can often delay the holding of an election by raising questions about unit determination and voting eligibility. Delay works against representation in the great majority of cases. Since both parties know this, employers have an advantage in negotiating election issues prior to the vote. It would be a useful change to require the Board to develop expedited procedures under which quick elections are routinely held and technical questions of eligibility and unit determined afterwards.

B. COLLECTIVE BARGAINING

Union difficulties in organizing cannot be separated from the increasing misuse of the collective bargaining process by employers.

1. Employers Should Not be Permitted to Permanently Replace Striking Workers

In 1937, the Supreme Court in *NLRB v. Mackay Radio* announced that employer's may hire permanent replacements for striking workers and that at the end of the strike the employer could "reinstate only so many of the strikers as there were vacant places to be filled." The *Mackay* doctrine often makes a mockery of the law's right to strike and it encourages anti-union employers to bargain with a view to forcing a strike. They can then replace the striking workers and anticipate the union's demise. The *Mackay* doctrine's application has permitted the devastation of unions, communities, families, and individuals simply because employees exercise rights supposedly protected by the National Labor Relations Act.

The *Mackay* doctrine has been defended on the grounds that the right to permanently replace is somehow necessary to permit employers to withstand strikes. The metaphor of the "level playing field" has frequently been employed in its support. Scholarly investigation, however, including my own study of the paper industry, refutes this conclusion. Employer's have a variety of self-help tactics available, and do not need the right to permanently replace. Temporary replacement workers, supervisors, and newly hired workers who are not replacements will generally be available to permit an employer to operate during a strike.

The consequences of *Mackay* for the organizing process are significant. In every hard-fought election, employers make a variant of the following argument: "Under the law I am required to bargain with the union and I will do that, but I can and will bargain hard. I am not required to make any concessions or agree to any terms that I do not think are in the company's best interests. The only way the union can try to force me is by pulling you out on strike. If you go on strike to force me to accept unrealistic union demands, I have the right to permanently replace you, and I will not hesitate to exercise this right." Such an argument is perfectly legal. Its common use, together with employee knowledge of recent strikes in which other employees were permanently replaced, helps to account for the fact, that employees regularly perceive threats of reprisal in hard-fought election campaigns that do not violate the law. In fact in such cases employers are in fact legally threatening employees with job loss if they vote for representation. *Mackay* may also affect the campaign dynamic because employees fear to be placed in a situation in which they will have to choose between loyalty to fellow employees and preserving their jobs.

The *Mackay* doctrine is also inconsistent with increasing labor management cooperation, because it diminishes worker's sense of permanent attachment to the enterprise, a feeling which is essential to full cooperation.

C. EMPLOYEE INVOLVEMENT SCHEMES

The Dunlop commission, currently studying the labor laws, is considering amendments to the NLRA to facilitate the use of employee involvement programs in the non-union sector. Such programs, under current law, are legally questionable. Employer created programs under which employees deal with their employer about wages hours or conditions of employment, in the absence of a union, are likely to be held to constitute dominated labor organizations, illegal under Section 8 (a) (2) of the NLRA. The board orders the disestablishment of such programs. Employer groups have strongly urged the amendment of Section 8 (a) (2) to permit employee involvement programs in the name of labor/management cooperation. Unions have opposed such amendment on the grounds that most employee involvement schemes in the non-union sector are in reality aimed more at avoiding unions than empowering employees.

The union concern is a legitimate one, however, the likelihood is that amendment to 8 (a) (2) will be recommended. Various members of the commission have indicated their belief in the value of such programs; a recommendation would establish the commission's political neutrality. The value of empowerment programs either to employees or to employer's seeking to avoid unionization is questionable. Such programs in the absence of unions seem to have a limited value and a short life. In addition, it is likely that such programs will wet employees' appetites for representation and that it will cause employees to believe that unionization is necessary.

LABOR LAW REFORM

B. SOME KEY DIFFERENCES BETWEEN U.S. AND CANADA LABOR LAW

Kevin Banks, Professional Officer
Canadian Association of University Teachers

The percentage of American employees represented by trade unions has declined without interruption for almost twenty-five years. During that same period, the share of workers in Canada having union representation grew slowly but steadily, and though it has fallen marginally in recent years, it nonetheless stands above its 1970 level[1]. Over the last decade, the contrast between union density trends in the two countries has been studied by economists, sociologists, political scientists, and labour lawyers. While a number of competing hypotheses have been advanced, the evidence of comparative scholarship increasingly suggests that differences between the labour law regimes of the two countries have played a significant role in the relative decline of American unionism. Moreover, one recent study shows that there is little empirical support for competing explanations emphasizing structural differences between the economies and labour forces of the two countries, the degree of public ownership, or differences in social attitudes towards unionization[2]. Notwithstanding that the costs of unionization to employers are very similar in both countries, the probability that a Canadian worker who desires union status will in fact be unionized is 0.84 times higher than the equivalent likelihood for an American worker[3].

This paper will not join the debate over the validity of such empirical findings. Rather, in what follows I will outline a selective comparison of Canadian labour law regimes with the National Labor Relations Act. The comparison will focus upon five subject areas identified by various commentators as having influenced the relative fortunes of the Canadian and United States labour movements: certification procedures, labour relations board remedial powers, the use of striker replacements, union security, and union successor rights.

Most labour relations in Canada fall within the provincial, rather than the federal, jurisdiction. As a result, each province, as well as the federal government, has over the years developed a somewhat distinctive labour law regime. Nonetheless, it may be said that there is a common core to Canadian labour legislation. The industrial relations laws of each jurisdiction but Saskatchewan were founded upon the Dominion wartime regulations established in 1944 by Order in Council P.C. 1003. Moreover, those wartime regulations were patterned after the United States *National Labor Relations Act*. Thus, there is a broad structural similarity between Canadian and U.S. labour law. This simplifies the task of comparison, and casts the differences in the legal regimes of the two countries into bolder relief.

CERTIFICATION PROCEDURES

In the United States, a union may be certified as exclusive bargaining agent for a group of employees only after a National Labor Relations Board sanctioned certification vote. The election process appears to be understood as the best method for ascertaining the free choices of the employees concerned. The notion of free choice embedded in the *National Labor Relations Act* is, ideally at least, one of reasoned deliberation on the basis of all information relevant to estimating the probable consequences of certifying or rejecting the union. The length of union certification election campaigns, together with statutory and constitutional protections of employer free speech[4] afford employers considerable opportunity to seek to influence the decision of their employees with respect to unionization.

As a general matter, Canadian labour law takes a more sceptical stance towards the value of this sort of debate in certification procedures. There appear to be two aspects to this scepticism. The first is a greater concern with the potential influence of employers over employees than is found in the jurisprudence under the *National Labor Relations Act*. The second is a willingness to treat signed membership cards as sufficient evidence that employees have exercised their free choice in favour of unionizing. The focus of Canadian certification procedures is almost uniformly on moving quickly to ascertain whether majority support exists for certification application, rather than upon providing an opportunity for debate.

Most certification applications in Canada are decided without a representation vote, and in many jurisdictions a large number of certifications are disposed of without a hearing. In all provinces except Alberta, Nova Scotia, and Newfoundland (owing to recent amendments), certification of a union as exclusive bargaining agent is available on the basis of membership card evidence. Under Ontario's procedures, which are fairly typical, a union having obtained membership cards from at least 55 percent of employees in an appropriate bargaining unit will in most cases be entitled to certification without a vote. In Nova Scotia, where votes are mandatory, the election must take place within five days of the filing of a certification application accompanied by membership cards of at least 40 percent of an appropriate employee constituency.

Practically speaking, the card certification process seeks to thwart illegal employer resistance to union organization by removing the opportunity to engage in it. A recent study of Ontario certifications provides support both for this objective and for the means chosen to accomplish it, finding that (1) both delay and employer unfair labour practices were significantly and negatively related to the level of union support, and that (2) card certification procedures significantly reduced the effect of the illegal employer practices designed to influence worker choice[5].

In the event of a certification election, Canadian labour laws, like the National Labor Relations Act, seek to balance the interests of employers in expressing their views with those of employees to freely organize themselves. The statutory language reflecting this balance in each country is quite similar. In Alberta, Manitoba, New Brunswick, Nova Scotia, Ontario and Prince Edward Island, labour relations statutes provide that an employer is free to "express his views" so long as the employer does not use coercion, intimidation, threats, promises or undue influence. As one commentator has noted, the American Bill of Rights indirectly influenced Canadian labour law by shaping the American model upon which it is based[6].

Nonetheless, Canadian labour relations boards have arguably tended to place greater restrictions on an employer's communications with its employees during a certification campaign. While factual statements, or comments about an employer's ability to remain competitive or the issue of job security may not by themselves constitute illegal communications, Canadian labour relations boards have tended to view employer references to job security in the context of a certification campaign with suspicion. For example, the Ontario Labour Relations Board found in one case that repeated references to job security in employer letters to employees, in addition to factual references to plant closings elsewhere, were veiled threats to employment security conditions related to whether or not the employees were unionized[7]. In a later case, the Ontario board stated its position on employer threats to job security as follows:

> "Views which equate membership or non-membership in a union to continued job security, cease to be mere personal views and may become intimidatory or coercive if the person expressing them is perceived to be seized of special knowledge, or position, such that raises the statement from a matter of opinion to one of probable fact."[8]

Similarly, In Michelin Tires (Canada) Limited,[9] the Nova Scotia Board held that continuing employer predictions of inevitable serious strikes would be perceived by employees as a clear threat to their jobs and constituted undue influence.

The Board in this case was particularly attentive to the employer's ability to make its predictions self-fulfilling. Canadian labour relations boards have also been suspicious of captive audience meetings called by employers in the context of certification campaigns. In considering the weight to be given to an anti-union petition received by it following such a meeting, the Ontario Labour Relations Board commented as follows:

> "... such meetings convey the anti-union sentiments of the management regardless of their content and, because of this, tend to taint the following efforts of employees who decide to oppose the application [for certification]. In fact the very formality of holding such meetings demonstrates an employer's concern, and may, in the eyes of other employees, align with management those employees subsequently circulating a petition."[10]

In Ontario, anti-union petitions generated subsequent to such meetings are usually ignored by the Labour Relations Board. It should be noted however, that such meetings are generally not in and of themselves unfair labour practices, and that it tends to be the content of the meeting which ultimately attracts the censure of labour boards.[11]

While the Canadian approach to regulating employer speech is on its surface consistent with the general thrust of National Labor Relations Board's "laboratory conditions" doctrine, and with the treatment of employer "predictions" by United States Supreme Court in NLRB v. Gissel Packing Company[12] (holding that (1) an employer is free only to tell what it reasonably believes will be the likely economic consequences of unionization that are outside its control, and that (2) a belief that unionization will or may result in the closing of a plant "is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof"), the Canadian boards' approach appears to be more restrictive of employer's speech than that of Federal Circuit courts in cases such as NLRB v. Golub Corporation[13] and NLRB v. Village IX, Inc.,[14] or than the approach of the National Labor Relations Board in Midland National Life Insurance Co.[15].

Moreover, two important Canadian labour relations boards, the Canada Labour Relations Board and the British Columbia Labour Relations Board, regulate employer communications with employees during certification campaigns more tightly still. The Canada Labour Code contains no express permission of non-coercive employer speech. The Canada Labour Relations Board has implied a right of employer free speech, but on a strictly limited basis. In American Airlines Inc.[16] the Board stated its general rule as follows:

> "The employer's right to communicate with its employees must be strictly limited to the conduct of its business. The employer is only permitted to respond to unequivocal and identifiable, adversarial or libelist statements; by this we do not consider as being adversarial the fact that an employee wishes or does not wish to join a union."[17]

The British Columbia Labour Relations Code permits employer communication of a "statement of fact or opinion reasonably held." In a pithy summary of the implications of the Code's definition of employer free speech, the British Columbia Board stated in Fleetline Parts and Equipment Ltd. that "in the context of an attempt by a union to organize a group of employees, the employer retains the right to communicate with its employees; however, the employer's exercise of the right must be squeaky clean."[18]

LABOR BOARD REMEDIAL POWERS

The remedial powers of the National Labor Relations Board have been subject to telling criticism on the grounds that they provide little effective deterrence to or redress for employer unfair labour practices.[19] The imposition of a remedial order may be forestalled by two to three years where an employer pursues every avenue of appeal available to it. While the National Labor Relations Board is equipped with the power to seek injunctive relief in Federal Court under section 10(j) of the Act, in practice this is seldom done and the judicial and administrative resources to alter this practice appear to be lacking. As a result, while individual employees may eventually receive compensation for personal losses, the sanctions and remedies available under the National Labor Relations Act create little incentive for employers to avoid tactics designed to blunt the momentum of an organizing drive, or the quest for a first collective agreement.

Canadian labour relations legislation provides procedures which make enforceable orders available much more quickly than they are under the National Labor Relations Act. Labour relations board orders in Canada are typically issued following a single set of hearings conducted by the board itself. Board orders, once issued, are enforceable unless overturned on judicial review. Often, a board order may be filed with the courts through a simple administrative procedure. Upon such filing, it may be executed as any other judgement of the court would be. Non-compliance with board orders may be the subject of prosecution and punishment through the courts. Fines imposed upon conviction are generally set so as to have a deterrent effect.[20]

Recent amendments to the Ontario Labour Relations Act give the Ontario Labour Relations Board the power to make interim orders in a pending or intended proceeding.[21] In addition, where it is alleged that an employee has been terminated, disciplined or otherwise penalized contrary to the Act during a union certification drive, the Act now requires the Board to hold an expedited hearing into the matter.[22] The hearing is to be held within fifteen days on consecutive days until it is completed and a decision is to be rendered within a further two working days.

In addition, many Canadian labour relations boards are equipped with remedies better able to respond to the undermining of union support during organizing drives, which often creates serious difficulties for unions in reaching first collective agreements. The labour relations statutes of Ontario, Nova Scotia, Manitoba and British Columbia enable their respective labour relations boards to certify a bargaining agent without a representation vote where the board feels that the true wishes of the employees are not likely to be ascertained in a vote. These powers broadly parallel those available to the National Labor Relations Board and recognized by the United States Supreme Court in NLRB v. Gissel Packing.[23] However, in its Gourmet Foods decision, the National Labor Relations Board concluded that it did not have the power to issue a non-majority bargaining order.[24] In each Canadian jurisdiction where the board has the power to certify without a vote in response to unfair labour practices, it may do so without ascertaining that the union had at any time the support of a majority of employees in the bargaining unit. Recent amendments to the Ontario Labour Relations Act remove the criterion that a union have membership support adequate for collective bargaining from those to be considered in granting an unfair labour practice certificate.[25] The Nova Scotia Trade Union Act requires that an applicant trade union simply show that not less than 40% of the bargaining unit were members in good standing. The board in British Columbia will enquire whether it is reasonable to assume that the union would have achieved majority support in the absence of employer interference.[26]

Perhaps more importantly, in several Canadian jurisdictions, where a first collective agreement cannot be reached, a labour relations board may impose such an agreement on the two parties.[27] Access to this remedy does not necessarily depend upon there having occured unfair labour practices by either party. The sense of inevitability of a collective agreement, together perhaps with the unpredictability of the imposed outcome, acts as a strong disincentive to bad faith bargaining or other unfair labour practices designed to derail first agreement negotiations.

In the federal jurisdiction and in Newfoundland, if a first agreement cannot be reached, the Minister may direct the board to investigate and impose such an agreement on the two parties. Such an agreement is binding for one year unless the parties mutually agree to alter the terms. In British Columbia, the associate chair of the Board's Mediation Division has this power. In Manitoba and Ontario, the Board has the power to settle a first collective agreement on the request of an employer or bargaining agent. In Quebec, a council of arbitration has the power to impose first agreements.

USE OF STRIKER REPLACEMENTS

Supporters of the McKay Radio doctrine allowing employers to hire permanent replacements for striking employees tend to argue that it is a necessary counterweight to the right to strike itself.[28] However, many would argue that, particularly in the current economic climate, McKay Radio practically ensures that a strike cannot be won, while at the same time providing the employer with an opportunity to rid itself of the union.[29] The Canadian experience with striker replacement rules suggests that the ability to offer permanent positions to striker replacements is not necessary to a balance of economic power. Moreover, labour relations policy in many Canadian jurisdictions tends to treat the ability to hire permanent striker replacements as a breeding ground for picket line violence, and as inherently destructive of the collective bargaining process.

Ontario has recently followed Quebec's longstanding lead by enacting comprehensive prohibitions on the use of strike breakers.[30] As a result, most unionized employees in the two provinces making up roughly 60% of the Canadian workforce benefit from broad anti-strikebreaker rules. British Columbia also prohibits the use of strike breakers, though this prohibition does not extend to members of the bargaining unit or other employees at the affected location who volunteer to work during a strike.[31] Alberta and Manitoba provide explicit rights of reinstatement to striking employees.[32] Interestingly, the Canada Labour Relations Board has found the refusal of an employer to re-employ striking employees to be an unfair labour practice, notwithstanding the absence of a specific statutory prohibition on such refusal in the *Canada Labour Code*.[33]

UNION SECURITY

Canadian unions do not suffer the same restrictions on their ability to secure a membership and dues base, or to pursue organizing or political goals with dues funds as do their American counterparts. All jurisdictions in Canada except Quebec explicitly permit a closed shop clause (providing that only members of the union may be hired by an employer) to be included in a collective agreement. In both Quebec and Manitoba, the agency shop is imposed as a minimum form of union security. There are no "right to work" jurisdictions in Canada.

Furthermore, Canadian unions are not subject to any of the free rider problems created by the narrow definition of a union's "statutory functions" set out in the United States Supreme Court's decision in *Ellis v. Brotherhood of Railway, Airline and S.S. Clerks*.[34] In addition, notwithstanding that the Canadian Supreme Court has recognized a constitutional right not to associate within the constitutionally protected freedom of association, Canadian unions retain a discretion to spend agency fees for political, professional and economic programs not limited to collective bargaining. In *Lavigne v. Ontario Public Service Employees' Union*,[35] the Supreme Court of Canada consciously rejected the approach of the United States Supreme Court in *Abood v. Detroit Board of Education*.[36]

SUCCESSORSHIP

The *National Labor Relations Act* requires no more of an employer assuming control of a business or undertaking through a transfer or sale than that it bargain in good faith with the union representing the employees of the previous employer, and only under certain conditions.[37] In particular, the duty to bargain arises only once a "substantial and representative complement" of workers of the previous employer are hired by the successor employer. Indeed, the key determinant of whether there has been a successorship in the United States is whether the employer has hired a majority of the predecessor's employees.[38] This rule creates not only a disincentive to hire members of a transfering employer's unionized workforce, but it also eliminates collective agreement terms which constitute the vital achievement of an incumbent union. Any sale of a business or other transfer thus puts the incumbent union in a precarious position.

Under Canadian legislation, the purpose of successorship provisions is to bind the successor employer to the collective bargaining regime already established in its newly purchased business. This may entail the recognition of a trade union's bargaining rights or honouring the terms of a collective agreement.[39] While the definition of a sale or transfer of a business varies across Canadian jurisdictions, it has generally been given a broad interpretation consistent with the remedial purpose of successor liability provisions in labour legislation. Labour boards, arbitrators and courts have found a successor employer responsible for remedying the predecessor's breaches of a collective agreement. However, unlike in the United States, in the absence of specific statutory provisions, successor employers have been found not to be liable for the unfair labour practices of their predecessors. Such provisions do exist in the federal, British Columbia, Manitoba, Ontario, and Saskatchewan jurisdictions. In any event, whether or not such specific legislation exists, an employee terminated contrary to unfair labour practice provisions remains an employee in all jurisdictions, and a successor must comply with a reinstatement order directed at its predecessor.

CONCLUSIONS

Economic integration with the United States under the first Free Trade Agreement, and subsequently under the North American Free Trade Agreement, has brought with it fears in the Canadian labour movement of a race to the bottom as Canadian legislators seek to provide an investment climate competitive with that offered in relatively non-unionized regions of the United States. In this sense, supporters of the Canadian labour movement have a vital interest in any labour law reforms that the Clinton administration might seek to enact. While one might be left discouraged by the failure of even modest labour law reform proposals in the United States Congress over the last quarter century, there appears to be a growing consensus, at least among academic commentators, that the National Labor Relations Act needs to be overhauled. Moreover, for the first time in many years, employer groups have an interest in the reform process, since the National Labor Relations Board upheld the restrictions on "participative management" imposed by Section 8(a)(2) of the Act in its Electromation[40] decision. With both political camps having an interest in reform, the time might be right for change.

ENDNOTES

1. W. C. Riddell, *Unionization in Canada and the United States: A Tale of Two Countries*, mimeo, October, 1992, at table 1.

2. Riddell, *supra*.

3. *Id*.

4. Section 8c, National Labour Relations Act; *NLRB v. Virginia Electric & Power Company*, 314 U.S. 469 (1941).

5. T. Thomason, *The Effect of Accelerated Certification Procedures on Union Organizing Success in Ontario*, 47 Industrial and Labour Relations Review 207 (January 1994).

6. See Adams, Canadian Labour Law (1993, second edition) at 10-48, n.209.

7. See *Viceroy Construction Company Limited*, [1978] 1 Can.L.R.B.R. 22.

8. *Somerville Belkin Industries Limited*, [1981] 1Can.L.R.B.R. 100.

9. 80 C.L.L.L.C. 1609 (N.S.L.R.B).

10. *New Ontario Dynamics* [1975] O.L.R.B. Rep. Nov. 845, at 851.

11. See generally Adams, *supra*, at 10-58, 59.

12. 395 U.S. 575 (1969).

13. 388 F.2d 921 (2d. Cir., 1967).

14. 723 F.2d 1360 (7th Cir., 1983).

15. 263 N.L.R.B. 127 (1982).

16. [1981] 3 Can.L.R.B.R. 90.

17. *Supra*, at page 105.

18. (1980), B.C.L.R.B. No. 29/80, at page 15.

19. See P. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA*, 96 Harv. L. Rev. 1769 (1983).

20. *R. v. K-Mart Canada Limited*, 82 C.L.L.L.C. 14,185 (Ont. C.A.).

21. *Labour Relations Act*, ss. 92.1.

22. *Labour Relations Act*, s. 92.2

23. 395 U.S. 575 (1969).

24. 270 N.L.R.B. 578 (1984).

25. *Labour Relations Act*, s. 9.2.

26. *Beechwood Construction Limited*, [1977] 2 Can.L.R.B.R. 218.

27. See generally Adams, *supra*, at page 2-88.

28. See for example the position of Sen. Orrin Hatch in recent Congressional debates on the striker replacement issue, e.g. 138 CONG. REC. S7765-73 (daily ed. June 10, 1992).

29. See generally J. Getman and F.R. Marshall, *Industrial Relations in Transition: The Paper Industry* Example, 102 Yale L.J. 1803 (1993).

30. See Ont. *Labour Relations Act*, ss. 73.1, 73.2; *Que. Labour Code*, s. 109.1.

31. *Labour Relations Code*, s.68.

32. Alta., *Labour Relations Code*, s.88; Man. *Labour Relations Act*, ss.12, 13.

33. *Eastern Provincial Airways*, 84 C.L.L.C. 16,012 (C.L.R.B.), affd. C.L.L.C. *loc. cit.* 14,042 (F.C.A.).

34. 466 U.S. 435 (1984).

35. [1991] 2 S.C.R. 211.

36. 431 U.S. 209 (1977).

37. See *Fall River Dyeing and Finishing Corporation v. N.L.R.B., 482 U.S. 27 (1987), Howard Johnson Company v. Detroit Local Joint Executive Board*, 417 U.S. 249 (1974).

38. *N.L.R.B. v. Burns Int'l Security Services*, 406 U.S. 272 (1972).

39. See generally Adams, *supra*, at page 8-38.

40. 109 NLRB No. 163 (1992).

VI. TOTAL QUALITY MANAGEMENT

A. The Best We Can Be

B. Implementing Total Quality Management at a Community College: The Adventure and the Lessons Learned

TOTAL QUALITY MANAGEMENT

A. THE BEST THAT WE CAN BE

Daniel Seymour, President
Q Systems, Palm Springs, CA

The search for excellence is part of the vision of higher education. We give examinations to our students, then grades. We have tenure procedures. We use student evaluations to assess teaching effectiveness. The theory being used to improve quality, in all these cases, relies on inspection. Theorists who identify with this "sort and shoot" inspection methodology, work hard to find individuals who show unacceptable behavior relative to their peers, then take action to eliminate the offending behavior. Figure 1 illustrates the logic of pursuing quality by searching for deficiencies.

The theory, based upon traditional notions of quality assurance, attempts to measure one or more key quality factors and then uses a threshold to separate acceptable quality (which does not require action) from unacceptable quality (which requires action).

This addition by subtraction approach to improving quality that dominates higher education is a recipe for mediocrity.

RECIPE FOR MEDIOCRITY

Professors, staff, and students work in systems at their institutions. Those systems, like all systems, have variations in them. For example, with professors there is a distribution of talent on any campus that includes great teachers, not-so-great teachers, and bottom-of-the-barrel teachers. The "Before" distribution of Figure 2 is illustrative.

If we were to rank professors on the basis of their student evaluations, as is usually done, we might very well conclude that a professor, say Professor Seymour, is below the threshold -- unacceptable quality -- and an action would need to be taken. Presumably, if he had devoted a bit more time to his teaching his performance would have bumped him up to an acceptable level (designated by the triangle). No action would then be required. The question that needs to be asked

Figure 1: Bad Apple Theory

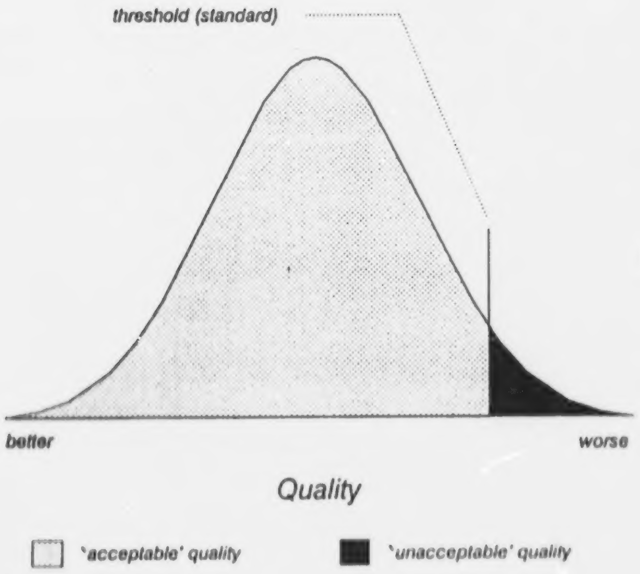


Figure 2: Quality-by-Threshold

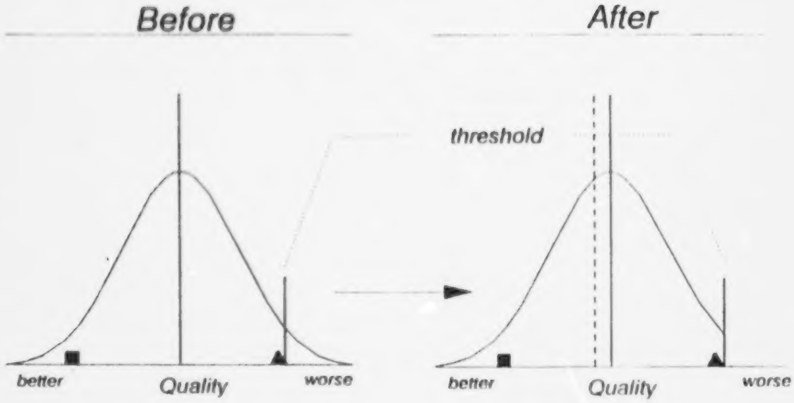
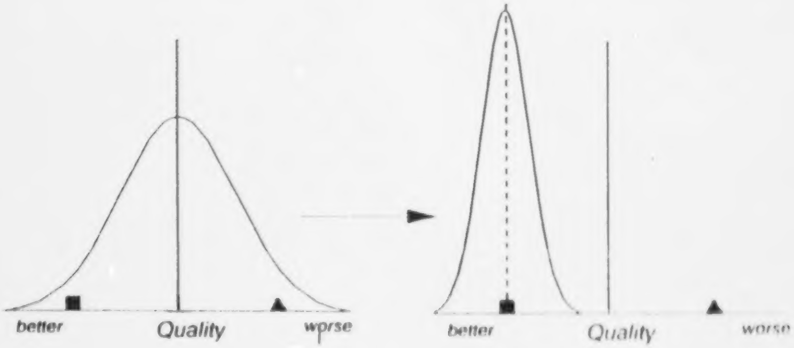

Before
After
threshold
better
Quality
worse
better
Quality
worse

Figure 3: Quality-by-Improvement


better
Quality
worse
better
Quality
worse

is, "Will the system's ability to identify Professor Seymour as deficient and eliminate him from the lot, change the quality of the professorate in the aggregate?"

The answer is "no." All failures to achieve a desired level of quality stem from two sources; they are either attributable to the system or to causes external to the system. An inspection approach, based upon a doctrine of improvement by elimination, has a limited ability to enhance the quality of colleges, because the overall level of quality is determined by the system, not by its outliers.

System failures are "common" causes because every participant in the system is at risk of experiencing a systemic problem. What are the possible common causes of poor teaching evaluations? There are many. Certainly, the hiring process is a potential problem. Is the hiring process-including the generation of a pool of candidates, the use of various criteria to screen candidates, and the department's voting procedures designed to ensure that the candidate with the best possible teaching potential is offered the position? Does the faculty development system have specific mechanisms in place to facilitate the transition from a bottom-of-the-barrel teacher to a great teacher? Does the system help identify "best practices" in teaching and supply the resources that would enable the individual to improve? The list of potential problems that are common to everyone is extensive.

The importance of controlling extra-systemic problems should not be underemphasized. There are bad teachers. But the "After" distribution of Figure 2 shows the net effect of a quality assurance approach that spends all of its time and energy on identifying and eliminating outliers, while ignoring the system that creates common cause problems. Even if an inspection methodology was sufficiently fine-tuned to be able to identify those individuals that were below some threshold, their elimination would have only a minimal influence on the overall distribution. Indeed, if the outliers are tossed and the mean recalculated, it moves only slightly to the left.

Continued reliance on quality-by-threshold means that as institutions we are asking the wrong question. We ask whether we are "good enough" instead of asking whether we are "the best we can be." The "good enough" question, in turn, necessarily drives the development of systems that use an inspection mentality and thresholds to determine sufficiency. It is hard to imagine a better approach to ensure mediocre performance in our institutions.

QUALITY-BY-IMPROVEMENT

Consider Figure 2 once again. Where do inspection theorists focus their attention? All of their time and energy is devoted to generating a distribution, defining a threshold, and scrutinizing those cases that cluster around that threshold. In their minds, a good system is one that can successfully discriminate between those cases that require action (fail the threshold test) versus those that do not (pass the threshold test).

Moreover, when these methods fail to improve overall quality -- which Figure 2 shows they are ill-equipped to do -- the tendency is to look for more effective ranking and sorting tools. For example, when faculty productivity studies and efficiency reports failed to kick-start effective cost control efforts in higher education, some states' revised their thinking. The next round of quality assurance initiatives to enjoy a wave of popularity are today's "report cards." They attempt to "grade" public colleges by comparing their performance on an exhaustive set of indicators, such as retention rates, student ethnicity, and the amount of sponsored research per faculty member.

The most troubling aspect of this inspection methodology is the inability of inspection theorists to understand that by focusing on adequacy, excellence necessarily eludes them. Again, Figure 2 illustrates the point. If it is possible to function at a level designated by the circle (in either the Before or After distribution), why is it acceptable to function at the triangle (slightly above the threshold)? Every time a college (or professor) fails to perform at the higher level of quality, it wastes resources; students do not learn at the rate they could. The most egregious waste of all is the time, energy, and money devoted to building elaborate bureaucracies necessary to give, sort, and shoot methodologies with the trappings of legitimacy and effectiveness.

Figure 3 represents a fundamental shift in thinking. As previously shown, if you remove the five percent or ten percent who fail to meet an arbitrary threshold, the overall level of quality will increase by a similar amount -- five or ten percent. Quality, in such a system, is a function of how many bad apples are tossed away. But what happens if you need to improve quality by 50 percent?

Would it not be better to redirect those same resources from after-the-fact inspection to before-the-fact improvement; from focusing on the tail to focusing on the whole group; from punishing and eliminating to encouraging and including? This suggests that our time and energy should be devoted to devising a system that improves the quality of the aggregate. A quality-by-improvement theory, illustrated in Figure 3, does just that. This theory views the distribution of quality -- from better to worse -- as a chance to learn about the whole system. It does that in several ways. First, rather than looking for and attacking bad efforts, quality-by-improvement identifies and studies best efforts. By linking these high-quality outcomes with the processes that produced them, improvement theorists are able to understand the dynamics of what constitutes "best practices." The next step is to institutionalize best practices by applying what has been learned to the entire distribution.

A second learning strategy is embedded in the epigram-"Every defect is a treasure." Looking at best practices helps to understand what is right with the system, by studying bad practices we are able to identify what is wrong with the system. Quality-by-improvement, therefore, looks to the tail-enders, not in the hopes that the discovery of imperfection will lead to sanctions, but that it will lead to a chance to improve processes. The logic is reversed: quality-by-improvement assumes that everyone wants to and is capable of doing a good job, and sees poor performers as good apples caught in a not-so-good system. Failure is treasured because hidden in poor results is part of the answer to why the system as a whole is under-performing.

The dramatic effect of applying these learning principles is evident in Figure 3. The range of quality results is narrowed, the variance reduced. In fact, the variation is reduced to the point that a "good enough" performance (designated by the triangle) in a quality-by-threshold approach lies outside of the quality-by-improvement distribution shown in the "After" portion of Figure 3.

The final learning strategy that makes this approach so effective is evident in a second epigram: "Good enough is never good enough." It suggests that there is always a better way, a more elegant system. High performers in a quality-by-improvement environment are encouraged to find ever more effective methods. They are praised and supported. They are looked to as leaders who value excellence and exhibit a healthy discontent toward the status quo. They are the quintessential reflective practitioners who strive to be the best that they can be.

An illustration might be useful. Let's say that the "Before" distribution in both Figures 2 and 3 represent "teaching effectiveness among tenure track professors." There is, as we might expect, a broad range of talent from "very effective" to "not-so effective." The aim in both systems is to improve teaching effectiveness; the methods, however, differ substantially. In the improvement-by-threshold system, student evaluations (developed and administered by management) are used at the end of the semester to generate data. Z scores are then calculated on the data and copies are sent to the professors. An additional copy is placed in their personnel file. If the evaluations are "good enough," no action is taken.

If the evaluations signal a problem, however, there are two courses of action. One course is to do nothing in the short run. After all, the professor is a professional. He or she has been given a copy of the Tenure Guidelines and should know the value placed on teaching. It is their responsibility to fix the problem and reach triangle status. If the problem still exists at the time of tenure review, action will be taken. Another approach would be to identify the individual earlier on and pursue corrective action. This could entail being sent to a Teaching Methods Workshop taught by the Faculty Development Center, if one existed.

Perhaps the president and the board recently decided to highlight the importance of teaching by offering a Teaching Excellence Award. Our tail-ender might go to the award ceremony and be inspired by the $10,000 merit pay check and the public recognition of excellence. Having redoubled his or her efforts, it is certainly possible that a higher ranking could be achieved.

Having applied this methodology to the "Before" distribution in Figure 2, the effect would look essentially like the "After" distribution in the same figure. Overall quality increases only slightly. Why? Because the best performers will continue to perform well; their motivation is largely intrinsic, not extrinsic. The worst will be sent packing. The middle of the distribution remains unaffected by tinkering with the tails because no learning is taking place.

So, very little improvement takes place. And at what cost? The cost ranges from the thousands of dollars invested in a student evaluation system designed to rank and sort to the losses associated with a six or seven digit investment in the development of a non-tenured, assistant professor. Add in the costs of developing and administering a tenure track system and you have a very expensive proposition. Indeed, from a return on investment perspective, the quality-by-threshold system is a disaster.

THE BEST WE CAN BE

This search for deficiencies, endemic in our colleges, will continue to produce marginal quality gains and do nothing to quiet our detractors, because its driving force is one of desperation. It is difficult to understand the dynamics of the whole and seek true understanding. The enormity of that hurdle is evident in the way we phrase our questions. We ask: "Why did Professor Seymour fail?" not "How did the system fail him?" In the face of thoughtful queries that require comprehensive understanding, the disease of desperation takes hold. It is a disease easily diagnosed in our institutions. There is an over-reliance on the tools of inspection: peer review is used to generate distributions of indicators and thresholds are derived; entire bureaucracies evolve to generate data and administer standards, rules, and regulations. Mid-level management, the policy of our institutions, thrive in this environment. Data crunchers are in DOS heaven. Control freaks and micromanagers abound. And it is all a desperate charade, an admission of failure, in which vast amounts of institutional resources are devoted to finding out who is not good enough.

I believe that the theory and practice of continuous improvement is needed because it is driven by inspiration, not desperation. Asking whether we are the "best we can be" inspires people to look beyond current practices. It requires us to reflect on "what is" and respond to "what could be." There is a positive tension that emanates through the organization as it stretches and learns. Fear and acceptance of mediocre performance is replaced by trust and a system that encourages and supports innovative change.

A quality-by-improvement approach would replace the desperate work of deriving and enforcing thresholds with the inspirational work of connecting means and ends, process and outcomes. It would foster a new appreciation for excellence and provide a systematic methodology for becoming the best that we can be.

TOTAL QUALITY MANAGEMENT

B. IMPLEMENTING TOTAL QUALITY MANAGEMENT AT A COMMUNITY COLLEGE: THE ADVENTURE AND THE LESSONS LEARNED

Susanna B. Staas, Quality Coordinator
Delaware County Community College

In 1986, when the President and Executive Staff of Delaware County Community College (DCCC) enrolled in a Quality Roundtable of industry leaders sponsored by the Philadelphia Area Council for Excellence, none of them or the rest of the staff at the College could have foreseen the excitement, the anguish, the accomplishment, or the frustration that was to come.

Eight years later, the changes at DCCC are momentous, but the road ahead is at least as long as the road just traveled. One thing we have learned is that the journey to Total Quality (TQ) is truly endless! This paper is an attempt to teach by example. We hope that others can learn from our successes and our problems.

How did it all begin? Why did our President enroll a college that by all conventional measures was already successful, fiscally stable, apparently content and growing? And once engaged in the TQ implementation adventure, how have we proceeded, have the successes been worth the effort, and most important, what have we learned?

The TQ adventure at DCCC began when an Associate Dean of the College, Dr. James Donald, saw the White Paper, "If Japan Can, Why Can't We," and became an immediate convert.

Lesson 1: A few people immediately understand and accept W. Edwards Deming's philosophy of Quality Management. These early "converts" are often effective supporters of the initial TQ implementation effort.

After seeing the film, Dr. Donald spent the next year or so studying Total Quality and keeping the President of DCCC, Dr. Richard DeCosmo, informed. Thanks to Dr. Donald's groundwork, Dr. DeCosmo was ready to take advantage of the Executive Quality Roundtable when it was offered by PACE, the Philadelphia Area Council for Excellence.

Even in the mid-eighties, the problems now besetting higher education (and Delaware County Community College) were on the horizon. Those problems included: sluggish employment and a reduced tax base leading to reduced state and local support; a rapidly changing employment base leading to changing demands for education; declining skills of new students; and an aging College staff, who were in danger of becoming complacent. To meet these problems, the College had to be able to marshall reduced resources to respond rapidly to the changing needs of its constituencies. Delaware County Community College could not afford to be complacent.

Lesson 2: It is difficult to change an organization. It is especially difficult to change it when everything appears to be going well.

Early in 1987, after a year of studying Total Quality Principles and organizational change strategy, the Executive Team of DCCC made the decision to implement TQ at the College. With little fanfare, the journey was begun.

To date, there have been four major phases of DCCC's journey toward implementing Total Quality management:

- Introduction and awareness
- Aligning the College's processes vertically
- Improving each administrative unit's processes and functioning
- Consolidation

The fifth phase, integrating the College's processes horizontally, is at its beginning.

The boundaries between each of these phases are permeable there is overlap and synergy.

I. INTRODUCTION AND AWARENESS

The decision to implement TQM at the College was made by the Executive Staff of the College. It was a top-down decision, and the continuing support of the top, especially the President, has been critical to the success of the effort.

Lesson 3: Educated support from the top of the organization is essential to success. Modeling of the new behaviors and philosophy is essential to the success of the transition.

DCCC's Executive Staff gradually learned to send TQ messages, such as:

- asking for data (graphically displayed) when in the past unsubstantiated opinion would have sufficed
- using TQ tools in meetings

- flowcharting processes
- employing a facilitator to help them to run a more participatory meeting.

When the decision to implement TQM was made, a Quality Coordinator was appointed and a top level team to plan and oversee the effort was formed. Membership on the "Implementation Team" (I-Team) included the Executive Team, the Faculty Union Representative, and the Quality Coordinator. The tasks of this team included:

- formulating an initial plan for introducing TQM to the College
- personally conducting some of the introductory TQ training sessions
- selecting introductory project teams that would be a successful example of TQ in action
- continuing their own education in TQ (clearly a case of the teacher staying a lesson ahead of the student)
- trying to model "TQ" behavior

Lesson 3 revisited: The importance of modeling cannot be overstated.

The implementation plan developed by the I-Team focused on three steps that were initially envisioned as being sequential. Instead, each step has been phased in gradually and the effort has simply broadened to include all three phases.

Lesson 4: The implementation process never finishes; the more we learn, the more we find to learn.

Step 1 as envisioned in the implementation plan focused on introducing TQ as a management strategy and educating the administrators and support staff in the tools and philosophy before introducing TQ to the faculty. The I-Team made this decision for the following two reasons.

The I-Team accepted Deming's statement that management is responsible for developing and maintaining effective management systems that support the production of the organization.

At that time, neither the faculty nor the College administration were sure how TQ might apply to the teaching/learning process.

Lesson 5 is inconclusive: It is common wisdom that groups excluded from an initiative often become skeptics and roadblocks. Furthermore, TQ preaches inclusiveness. As we have gradually learned to translate TQ concepts from the

industrial model to education, our general faculty have become increasingly enthusiastic.

Other colleges, notably Fox Valley in Wisconsin, did include their faculty from the beginning of their effort. DCCC's faculty was always welcome to volunteer to be included in the TQ effort. As a result of this policy, a small cadre of knowledgeable faculty developed over time. These faculty members have been leaders in the effort to apply these concepts to the teaching/learning process. (See discussion re: Step 3 of the implementation plan). Our conclusion: the decision probably depends on institutional culture and circumstances.

Step 2 of the implementation plan focused on developing curriculum for training programs to be sold to local industries and a for-credit certificate program in TQ.

Step 3 focused on introducing TQ into the classroom as part of curricula, as appropriate, and as a strategy for improving the teaching/learning process.

The initial timeline called for the TQ implementation plan to be rolled out over a five year period; and in our naiveté, there was undoubtedly an expectation that the plan could be implemented and finished within a defined period.

Lesson 4 revisited: Continuous improvement is the bedrock of Total Quality.

Once the implementation plan was in place, the I-Team moved to introduce the College's administration and interested other members of the staff and faculty to TQ. While the faculty were not systematically included in the initial implementation effort, they were invited to join. About 10 percent did.

A curriculum for an introductory 20 hour course was put together in partnership with the Philadelphia Electric Co. which was similarly involved in a TQ effort. Over an eighteen month period, 100 percent of the administration, 25 percent of the support staff and 10 percent of the faculty took this course.

Initially, three project teams were organized: a copying team, a parking team, and a team that addressed placement of students in academic majors. The intent of the teams was to "sell" TQ to the College by their visibility and success in improving long-standing problem situations, and to serve as training arenas for the team participants.

Luckily, two of the three teams were very successful. Not so luckily, the third was a disaster and all three took much longer than anticipated. All of these triumphs and failings, we were to learn, were common.

Lesson 6: Probably the most positive result of these three teams was the fact that all participants did learn and many became believers. All participants of successful and

unsuccessful efforts were equally celebrated - a powerful message in a success-oriented institution.

Nine formal project teams were ultimately organized. Two-thirds of them were successful (i.e., achieved notable favorable improvement). At the conclusion of the work of these nine teams, all of the administrators and a quarter of the faculty and support staff had received training and experience on a team. They had learned the philosophy of TQ and they were conversant with the tools and with working in a team. Why then was TQ not spreading like wildfire throughout the institution?

Lesson 7: Without systemic changes designed to support TQ management, and continuing assistance, participants were unable to apply their new insights and skills when they returned to their regular work.

Through a fairly painful process of exploration and analysis, the I-team concluded that the strategic planning process, of which the Executive Team was justly proud, and the daily management of most administrative units, (all managed by conscientious people who were doing their best) needed major overhauling.

II. ALIGNING THE COLLEGE'S PROCESSES VERTICALLY: STRATEGIC PLANNING

The College's traditional strategic planning process was revised over two annual planning cycles. Iterative loops between the Board of Trustees and the Executive Team and the administrative units were added to the process of developing goals and strategies. In addition, a formal quarterly review process was developed to encourage accountability and to allow for necessary revisions of the goals and strategies. During this period, the budgeting timeline was revised so that budget development was concurrent with the development of the goals and strategies. Previously, budgets were developed ahead of the annual goals and strategies.

Finally, implementing TQM college-wide was made a strategic goal for the College, and the Executive Team agreed to actively encourage the use of TQM strategies and tools to implement the College's strategic goals.[1]

Lesson 8: To succeed, implementing TQ had to become a part of the College's strategic business plan. A strategic plan's success depends on the capability and accountability of the operating units of the institution to support the plan. The best way to ensure the capability and accountability is to include the operating units in the formulation of the plan.

III. IMPROVING EACH ADMINISTRATIVE UNIT'S PROCESSES AND FUNCTIONING

Many staff members concluded their project team experience by becoming enthusiastic converts to the TQ philosophy, only to meet frustration when they returned to traditional procedures and structures in their daily work. Initially, because everyone was learning, there was little structural support or ongoing coaching for these individuals. "Administrative Fundamentals," as the effort to improve daily management at DCCC was initially called, saved the day.

Administrative Fundamentals is a structured method designed to teach administrators and their staff to view their work as a system which is in turn part of the larger College system that focuses on the College's mission. Over eighteen months of intensive work supported by training and encouragement from the I-Team, unit administrators, and their staffs learned and accomplished the following:

- Each unit, working as a team, developed a mission that supported the College's mission, and clarified that unit's place in the College system.
- Each unit identified its customers and its products. (Most were surprised to learn that their customers were usually internal customers and that their products were usually services.)
- Each unit identified and flowcharted the most important work processes for which it was responsible. (This proved to be very difficult: most of us were accustomed to viewing our work as a collection of discrete tasks instead of an active process composed of steps that add value until it culminates in a product/service that meets the needs of a customer.)
- Each unit identified methods for measuring the effectiveness and efficiency of its processes.
- Almost inevitably, the improvement projects became a way of life. Administrators were embarrassed to share a flow chart that showed redundant steps or unnecessary complexity, or to share measures that reflected waste or dissatisfied customers. The flowcharts, which were snapshots of the process, proved to be an ideal foundation on which to build a problem solving improvement effort.

Lesson 7 revisited: Employees need systemic support and continuing assistance to apply TQ to their daily work.

The combination of the revised Strategic Planning process and the Administrative Fundamentals effort moved the TQM Implementation forward in a great surge.

Lesson 9: Three ingredients seem to be necessary to bring TQ to individual daily work: an impetus, structural change and continuous support.

A surge produces waves, and this was no exception. Implementing Administrative Fundamentals required a tremendous investment of precious time with no evident reward. Regular work proceeded as usual in tandem with the effort to develop unit missions, flowcharts, measures, etc. The process improvements resulting from the Administrative Fundamentals that would eventually save time and effort were still many months away.

The TQ implementation effort faced its greatest challenge. Administrators and support staff were exhausted, discouraged, and frustrated. They were vocally resistant, and some administrators resorted to fulfilling the form not the spirit of Administrative Fundamentals. The gulf between the executives, who in their enthusiasm pushed hard for the Administrative Fundamentals, and the rest of the staff seemed to be widening, helped no doubt by TQ-inspired expectations for an atmosphere of teamwork and caring.

Lesson 10: It is easy to forget the internal customers, those who report to a manager are his/her internal customers.

IV. CONSOLIDATION

In response to the growing angst, the I-Team created a TQ Steering Team composed of administrators having a range of responsibilities within the College. Members of the team were selected from a pool of volunteers. The I-team directed the Steering Team to monitor the needs of the administrators and staff as they implemented TQ in their various areas.

Specifically, the charge to the Steering Team was and is today:

- To plan, support and steer implementation of TQM at the operational level
- To regularly communicate with College employees to identify implementation barriers and solutions
- To develop and implement communication strategies
- To develop a training plan for all staff
- To pilot new initiatives
- To model TQ

In its three years of existence, the Steering Team has served as liaison with the customers of the TQM implementation effort, and as a motivator and strategist for continuing the effort.

Initially, the team interviewed constituents to determine the problems they were experiencing with the Administrative

Fundamentals effort. Based on the data that was collected, the timeline for completing the effort was lengthened, and just-in-time working sessions that provided the participants new information and the opportunity to immediately use the information to complete a step in their Administrative Fundamentals effort were begun.

To help us all to keep our focus, the Steering Team sponsored a college-wide effort to create a vision of DCCC as it will be when TQM is "fully" installed.

In May, 1993, the Steering Team distributed a climate questionnaire to DCCC administrators and staff to once again take the pulse of the TQM implementation effort. The results from this questionnaire helped to focus the College's ongoing TQ implementation efforts on the multiple internal customer/supplier relationships that exist at the intersections between processes.

In 1993-94, a group of ten volunteer "TQ Mentors", sponsored by the Steering Team, was chartered and expected to assist all DCCC staff in their TQ efforts by providing just-in-time assistance with the tools, team management and participation, meeting management, data collection and measures. Instead, (and in addition) the organization has developed into a "think tank" that grapples with TQ theory and application issues.

The support staff at the College has developed its own TQM Co-op -- a "users" group, whose purpose is:

> To provide an opportunity, (i.e., the time and place) for support staff to share their thoughts on Total Quality concepts, tools and practices in an open, supportive exchange in order to facilitate implementation of TQ in their daily activities.

The chair of the Co-op periodically attends Steering Team meetings.

Lesson 11: The success of an effort depends on the success with which the implementers and the managers pool and advance their knowledge and skills.

As the administration at DCCC has gradually embraced TQ and management of the institution has improved as a result, the TQ philosophy has spread. Gradually the second and third of the three thrusts contained in the original TQ implementation plan have been addressed.

Curriculum for contract training has been developed, and the College has become recognized, regionally, for its training in TQM and ISO 9000.

A fifteen credit certificate program in TQM was initiated in 1991. The development, subsequent management (by the team of part-time instructors chaired by an administrator-coordinator), and ongoing improvement of the curriculum has been a self-conscious model of Total Quality Management.

TQ has been introduced into the classroom as part of the teaching/learning process. Early in the implementation of TQ at the College, many faculty members voluntarily participated in introductory sessions about the principles of TQ. In 1992-93, forty faculty members, supported by the College administration, began to systematically use the College Assessment Techniques developed by Pat Cross and Tom Angelo[2] and to use Project LEARN, an application of TQ principles to the classroom developed by Kathy Baugher at Samford University.[3] Not only have these efforts produced exciting results in the classroom, the faculty have been enthusiastic about the opportunity to work and to learn together, across the customary boundaries of their disciplines.

Lesson 12: Sharing the advances, problems and improvements is energizing and fun!

V. HORIZONTAL INTEGRATION: THE NEXT PHASE IN THE JOURNEY

Michael Brassard of GOAL/QPC, a consulting and research firm in Methuen, MA, has summarized the basic components of TQM into three categories: Unit Optimization, Horizontal Integration and Vertical Integration.[4] Although DCCC is starkly aware of the limitations of its efforts, the College has addressed Unit Optimization and Vertical Integration with some success. Horizontal Integration, represented by free exchange and problem solving cross-functionally, within the boundaries set by the College's mission and strategic goals, is the next challenge and DCCC's implementation goal for 1994.

Lesson 13: Knowledge of the TQ philosophy and concepts, facility with the TQ tools and problem solving techniques, deep understanding of the implications of statistical variation, and successful vertical alignment and process management are not enough! Teamwork, and the skills in human interaction that enable teamwork are critical (and difficult to learn and to use).

IS IT ALL WORTHWHILE? Consider that today at DCCC:

DCCC's Strategic Plan for the 90's was built on the input of all of the College's constituencies including the employees; and the iterative process that continuously involves areas and departments in both its formulation and implementation has ensured that the plan is on schedule and that modifications dictated by changing circumstances have been made promptly.

Employees know the College's mission and support its goals.

Employees know the mission of their department and understand how their department supports the College.

Each department has charted the processes that have been identified as most important to supporting the mission. These processes are monitored and improved.

The list of improvements lengthens daily. Most important, the culture of continuous data-based improvement grows stronger almost daily.

DCCC and the high schools from which our students come (our suppliers) are exploring partnerships designed to increase the level of the students' preparation for college. Most exciting is the involvement of the faculty in classroom-based improvement efforts. Early in 1993, almost one-third of the one hundred and twenty full-time faculty became involved in structured efforts to improve the teaching/learning process in their classrooms. This fall, 1993, the involvement will extend to the part-time adjunct faculty.

Involvement is, perhaps, the key result of implementing TQ at Delaware County Community College. Of DCCC's staff, 48 percent have worked for the college for more than ten years. Most of them have seen many programs begin and end. Most of them could be forgiven, if at times they admitted to being certain that they have addressed almost every conceivable challenge a student can present.

Instead, at Delaware County Community College, the majority of staff (not all, we are a long way from perfection!) are involved in continuously improving the services they provide to their customers. That's exciting!

WHAT IS AHEAD?

In the early spring of 1994, the college administrators participated in a successful retreat designed to increase their awareness and understanding of the behaviors that enable successful customer/supplier partnerships. A follow-up meeting elicited a list of short and long term strategies encouraging and supporting all DCCC staff to examine and improve the myriad customer/supplier partnerships in which they are involved.

Simultaneously, the Executive Team finds itself under increasing scrutiny and pressure from the rest of the college community to behave more "TQ." This expectation translates into sharing more information, increasing the use of data for decision-making, and expanding the avenues for (data-based) input from staff.

Lesson 14: The bar is continuously raised. The better we get, the higher the expectations. Continuous improvement never ends!

ENDNOTES

1. Lois Gold, then District Manager of Quality at Hewlett Packard, must be credited with teaching the I-Team about Hoshin Planning, on which the revised Strategic Planning Process is based.

2. Cross, Patricia & Thomas Angelo, *Classroom Assessment Techniques*, Jossey Bass, 1993.

3. Baugher, Kathy, *Project Learn*, Samford University, 1992.

4. Brassard, Michael, "The TQM Wheel," GOAL/QPC, Methuen, MA, 191.

VII. PUBLIC RELATIONS

A. **Public Relations and University Budgets: A Union Perspective**

B. **Public Relations and University Budgets: A CUNY Case Study**

C. **Public Relations and University Budgets: The University of Connecticut Experience**

PUBLIC RELATIONS

A. PUBLIC RELATIONS AND UNIVERSITY BUDGETS: A UNION PERSPECTIVE

Arnold Cantor, Executive Director
Professional Staff Congress, AFT

An American Federation of Teachers publication called "How to Fight State Budget Cuts in Higher Education," is, in my judgment, an excellent exploration of this morning's topic. Although its focus is on higher education unions, everyone interested in improved funding for our institutions will profit from following its suggestions--some of which are:

- Get to know the major players and the budgetary and political process.
- Develop a strategic plan.
- Form key alliances
- Produce attractive, accurate information about your institution.
- Use the media.

I am sure that none of these ideas are new to you, but the fact is that, Larry Gold, Director of the AFT Higher Education Department says in the publication, "the obvious is not always done, and following through on simple themes can be very hard and highly complicated."

The important idea here is that successful public relations whether aimed at improving university budgets or, for that matter, for most other goals, cannot be "ad hoc," but rather must be carefully planned, researched, and implemented. It is probable that each speaker on this panel will in his own way advocate concepts similar to what I have said so far. Rather than dwell on the particularities of our experiences at CUNY, I would like to take a broader approach to the topic. Incidentally, whenever we speak about budgets and campaigns for them, I am reminded of a speech by Al Shanker back in the 1960s. He was addressing a group of K-12 unionists on the topic of school budget campaigns and he made a point which I had not thought about, but which has stayed with me all these years. When the government advocates a ten million dollar cut in a school budget and, as a result of a strong union lobbying campaign, the cut is only five million dollars, we tend to consider that an important union victory. Certainly, from many points of view it is a victory. But the fact remains that the budget is five million dollars less than it was. A series of such "union victories" could result in the demise of the institution!

My message today is to think "public relations" all year long and not just at budget time. The importance of an institution of higher learning, adequately funded so that it can fulfill its mission, to the economic and sociological well being of society at local, state and national levels is the message that we have to disseminate. The path to upward mobility particularly for the youth of our urban communities, but also for all youth and the absolute necessity of competing globally at all levels of sciences and technology coupled with the value of the liberal arts in all walks of adult life, make the higher education enterprise literally a matter of survival for our society and for our nation. The recognition of these facts by entities outside the higher education community is, it seems to me, essential. If we are successful in spreading the truth about the importance to everyone's future of higher education, our ability to convince politicians to provide us with our fair share of the economic pie will be much enhanced. Politicians will respond more readily if they know their grass root constituents support their actions.

What I am suggesting may be wishful thinking but I believe that each college or university either on its own or, better yet, on its own and in concert with other institutions should support a well planned and well executed advertising campaign. We should recognize the success of the importance of effective advertising in the corporate world and adapt some of those techniques to our cause. I am not speaking here of the advertising that colleges and universities frequently do to recruit students, but rather of an ongoing advertising campaign, aimed at the general public, utilizing the various media, in which the message is the importance of higher education. Why not a consortium of higher education institutions for purposes of retaining an established advertising firm?

During the times of the year when budgets are being developed, it is, of course, important to speak with the media and to try to get favorable coverage. But, as we all are painfully aware, we are at the mercy of the individual reporter and his or her editor in terms of what actually gets into print. When we purchase advertising time or space we control what is said or printed. If planned and executed skillfully this can be an important tool for the overall benefit of our students, our faculty and staff, and our entire endeavor. A word of caution -- while there is no question that we have a tremendous reservoir of talent and expertise within our ranks, I would recommend that we encourage the retaining of an established successful outside advertising agency, using our in-house expertise in an advisory capacity. We deserve the very best in the business in terms of experience and proven ability to maximize our chances of success.

When we see or hear "a mind is a terrible thing to waste" the United Negro College Fund immediately comes to mind, when we see "Snoopy" in a commercial we think of Met-Life, when we see or hear "there's only one Jeep" we conjure up a vision of a Jeep -- by the way, one would think that by now they would have sold the one Jeep! The point here is that if there could be some phrase or object that would bring to the mind of the beholder the idea that higher education is essential to our future -- perhaps a talking mortar board or diploma or an ivy covered tower -- something that depicts higher education in a positive light -- I believe that this would represent money and resources well spent. Under this plan each institution would budget some of its resources toward a sophisticated public relations campaign aimed ultimately at making it more likely that public monies and private donations will be committed to higher education.

Over the years such organizations as the International Ladies' Garment Workers, the United Federation of Teachers, the National Education Association and others have done some media advertising. But I am suggesting that we institutionalize the idea of advertising the value of a higher education through the various media on a regular basis. There is general recognition in other countries that the United States has the best higher education system in the world. It is about time that we convinced our own citizens.

Obviously, a public relations advertising campaign of this type must be in good taste. It is essential that in our zeal to sell what is really a wonderfully high quality product we take only the highest road possible. It is also essential that we promulgate data to support our arguments in terms of program quality, past successes, future needs, and potential in an evolving society.

There will be those in the academic world who will argue against this kind of "rank commercialism" as being not in keeping with proper standards of professionalism or not appropriate to an academic setting. My answer to them is "hogwash." It is in my mind perfectly respectable to use the media to communicate effectively with the public at large not only that which is the truth but also, as has been stated, that which is essential to this country's continuing status as a world leader. One could argue that not only is it perfectly respectable and appropriate, but it is, in fact, our responsibility to do so. The time has long since passed when we can afford to rest on our considerable laurels and expect everything somehow to turn out alright. I think we need to take command of our future and I believe that effective and continuous use of the media on our behalf can produce the kind of public relations we all desire, which in turn can constitute a significant contribution toward answering the sometimes conflicting demands being made upon us for accountability, cost effectiveness, accessibility, and high academic standards.

PUBLIC RELATIONS

B. PUBLIC RELATIONS AND UNIVERSITY BUDGETS: A CUNY CASE STUDY

Jay Hershenson, Vice Chancellor
University Relations, CUNY

Our topic for this morning is public relations and university budgets and I would like to begin by discussing the subject in a practical way, from a City University perspective. When I use the phrase "public relations" in this context, I do not refer to the impact of an individual article in the newspaper or a television story on a budget issue, or a letter to the editor, or any single communication. I mean the development and implementation of a year-round, comprehensive program to disseminate information and to actively solicit participation in discussions and conversations about the university's goals and objectives. Similarly, the term "university budgets" no longer refers to the budget bill adopted on the day of reckoning when the state budget is finally agreed upon or when the city budget is put to bed. It reflects a year-round process of informal and formal relationships with governmental staff, college constituencies and community leaders that simply never ends. Any comprehensive strategy, therefore, to link public relations with the acquisition of resources must be formulated with this year-round reality in mind.

Secondly, the university has to take into account the increased professionalism of the staffs associated with those governmental offices that develop budget recommendations. Questions and requests for information must be taken seriously. We need to understand and appreciate the limits they may be functioning under and the potential help they can provide. We need maximum information from them about revenue and expenditure levels as a whole, not just for the university, in order to understand better the priorities of the elected officials who determine the size and shape of public university budgets.

Thirdly, there is a compelling need on our part for continuing sensitivity to important concepts, such as genuine cost effectiveness, economic development, evaluations of existing programs, and programmatic reviews that should be initiated by universities rather than by the government. Similarly, our continued commitment is needed to vital social and academic concerns, including the acculturation and transformation of immigrant students into college-educated citizens, the provision of educational opportunity for the economically disadvantaged, the maintenance and enhancement of academic quality, and university involvement in community, school system, and public service programs. All these elements remain very much in the forefront of a successful strategic approach to maximizing resources.

It is also important to perceive any public relations effort as a collaborative one, not the exclusive property of the administration, or the faculty, or of any one particular group. This year, for example, for the first time, both the CUNY and SUNY chancellors lobbied side by side with the Professional Staff Congress and United University Professors leadership and New York State United Teachers in order to secure legislative support for additions to the Governor's Executive Budget. This unified front sent an important message to legislative leaders in the midst of the budgetary review process. Coalition building is a major component of any effective public relations strategy, especially given the value of a coordinated approach to resource acquisition.

I wish to present one case study of a public relations initiative that was directly linked to the university budget and which benefitted from the inclusion of the aforementioned elements.

The 1991-92 New York State budget failed to fund essential associate degree programs at The City University of New York's New York City Technical College (NYCTC) and John Jay College of Criminal Justice. Instead, the budget required that the City of New York bear these costs, involving $23 million. This occurred because the State embarked upon an overall State-wide bond refinancing strategy that generated a one-year savings of approximately $23 million and the will simply did not exist to pass this relief on to New York City. By placing this burden on the City, and ultimately CUNY, thousands of students, and hundreds of faculty and staff at the senior and community colleges were placed in jeopardy. The State refused to support these programs even though:

- By law, NYCTC, which is located in downtown Brooklyn, and John Jay, located in Manhattan, are senior colleges and entitled to full State funding;
- SUNY senior colleges with associate degree programs continued to receive full State funding; and
- The programs at NYCTC included nursing, hotel and restaurant management, printing, ophthalmic dispensing, electrical technology and the programs at John Jay included security, corrections, and public administration -- all essential and in demand.

Grappling with its own fiscal difficulties, the Mayor's Office indicated that it could only provide support by reducing the community college budget by $23 million. This alternative was unacceptable to CUNY.

By the end of June 1991, the situation had reached crisis proportion. Both the State and City budgets had been adopted and neither executive took responsibility for the associate degree programs which were due to enroll 6,500 students at the end of August. William Douglas, a reporter for New York Newsday, was contacted and he put it succinctly when he wrote that the State and the City were "like two restaurant patrons who stare blankly at each other when the check is presented." Chancellor W. Ann Reynolds informed the Board of Trustees that if CUNY did not succeed in obtaining funding, the programs would have to be disbanded, disrupting the academic lives of 6,500 students and causing layoffs for hundreds of faculty members. The Board unanimously adopted a declaration of retrenchment in the event that the funds were not forthcoming.

Chancellor Reynolds led a public relations campaign to persuade the City government to find the needed funding, while informing both the City and the State of the consequences of their inaction. The Chancellor stated, with the support of NYCTC President Charles Merideth and John Jay President Gerald Lynch, that the two colleges would have to absorb the $23 million reduction and that the University was prepared to retrench the programs instead of spreading out the cuts to the community colleges.

The Chancellor's strategy was to publicize who would get hurt -- especially students, mostly low-income and minority, who were trying to complete career-oriented programs in order to qualify for jobs that were waiting for them. Employers and the public would suffer because these jobs were in fields where there are substantial shortages of trained personnel -- nurses, medical technicians and technologists, criminal justice officers, business technologists, hotel-restaurant managers, and many more. Ultimately, the City workforce would be devastated.

The plan had several elements -- gaining news coverage, editorial support, and public backing by business, labor, and elected officials, as well as letters to the editor and governmental officials by students, parents, and alumni in order to demonstrate the breadth of support these programs had. The first step was seeking coverage from The New York Times and Newsday on the magnitude of the cuts and an early request for editorial support from the Amsterdam News, which resulted in a blistering editorial by publisher Bill Tatum denouncing the impact on minority students. Later on, we learned that Congressman Charles Rangel personally showed this editorial to Mayor David Dinkins.

The next phase involved a press conference on the steps of City Hall on July 12. Participants included CUNY Chancellor W. Ann Reynolds, President Merideth, President Lynch, Brooklyn Borough President Howard Golden, numerous State legislators and City Council members, including alumni of the two colleges; the president of the Professional Staff Congress, Irwin H. Polishook; President Robert Bailey of the Brooklyn Chamber of Commerce, a vice president of Brooklyn

Union Gas Co., and NYCTC and John Jay faculty leaders. Students, who attended the press conference in their lab coats, police cadet shirts, and chef's uniforms, were interviewed and spoke movingly on the potential loss of educational opportunity. Student government leaders and NYPIRG representatives participated in and carried signs and banners to protect the cuts.

The press conference was covered by all New York daily newspapers, television and radio news reporters, and several Black and Spanish-language newspapers and stations. The University's message came through clearly. A video tape of the press conference was quickly produced and aired frequently on CUNY-TV for the following two weeks.

The next step was to ask influential supporters to send letters to the Mayor and the Governor that could then be converted into news releases. This included a letter from top chief executive officers in the downtown Brooklyn MetroTech Area Business Improvement District, of which New York City Technical College was a participant, and from the Executive Director of DC 37, American Federation of State, County and Municipal Employees.

Talks by the Chancellor and concerned friends of CUNY continued behind the scenes with City government officials for the next two weeks, with no movement, while the media continued to cover the story. Visits to both colleges were arranged with public officials and staff. On August 1, the University's Board of Trustees met in special session and declared a state of financial exigency at the two colleges, the first step required in order to dismantle the programs, if funding was not found. The media covered the meeting and a press release was distributed on the Board action. In addition, we conferred with all the newspaper editorial boards, seeking their support. The Daily News, in an editorial titled "Students at Risk" stated, "It's not just red ink. It's educational lifeblood." The New York Times emphasized "Mass Layoffs" in its story headline and in an editorial titled "Careers at Risk" asked "Can the city justify dismantling programs that represent future employment?"

Although some observers accused the Chancellor and the University of brinkmanship, the Board of Trustees' action was no ploy. With classes scheduled to start and no money, a decision was near on whether to cancel the programs. The weeks of lobbying and media pressure resulted in a dramatic final hour announcement by the Mayor on August 12 that the City would use $19 million in one-time revenues to enable the students at New York City Technical College and John Jay College to continue their studies for the academic year. The statement added that the University would continue to seek management savings and other funds to make up the $4 million shortfall. The announcement of the "rescue" received full coverage by The New York Times, Newsday, and the Daily News, indicating of the level of interest in vital educational programs at stake. A one-year solution was in place.

Eventually, the State and City governments addressed this problem in order to avoid a repeat scenario. With the leadership of the New York State Assembly, by 1992-93, earmarked tax revenues were put aside to fund the programs and support was provided on an ongoing basis. The road to this solution was arduous and required extraordinary help and assistance from key State officials, including the late Speaker Saul Weprin, Higher Education Committee Chair Ed Sullivan, and the Black and Puerto-Rican Caucus.

In closing, I would offer a few general observations. A major part of any successful public relations effort is to acquaint decision-makers with the quality of the service and wisdom of the activity they are helping to support. If you want decision-makers to support a college program which helps low-income students gain access to careers, then decision-makers need to see it first hand or, second best, at least learn about it from credible sources. There is no substitute for consumer interaction with decision-makers, if one is looking to engender a sense of support. At the same time, credible presentations and effective representation by University officials and advocates provide the basis for the practical targeting of resources that go beyond the rhetoric of verbal support. Invariably, an effective public relations program is inextricably linked to the ability of university leaders to become known in the corridors of power as innovators for positive change and genuine champions of educational access and quality. Then, we are all in a better position to help higher education benefit from a year-round approach to public relations and the university budget.

PUBLIC RELATIONS

C. PUBLIC RELATIONS AND UNIVERSITY BUDGETS: THE UNIVERSITY OF CONNECTICUT EXPERIENCE

Edward C. Marth, Executive Director
American Association of University Professors
University of Connecticut

> The AAUP has done the public relations work for the University." "The AAUP has led the way in stabilizing the University in the interests of the students and to preserve excellence; their leadership was without hesitation and was in keeping with their UConn tradition.
>
> - Lewis B. Rome, Chairman of the University of Connecticut Board of Trustees

To return the compliment, we would say that a lesser leader than Mr. Rome might not have seized the opportunity for a good working relationship with the AAUP in days of crisis, but he -- with former UConn AAUP President now University of Connecticut President Harry J. Hartley -- chose to work toward common goals of preserving faculty jobs, academic programs, and compensation in the worst economic deterioration Connecticut has seen since the Great Depression.

BACKGROUND

In the 1980s Connecticut enjoyed the economic boom as much as any state did. The defense buildup in the Reagan years created submarines, jet engines, helicopters, munitions, uniforms, tools, and more in Connecticut. In the absence of natural and man-made disasters the very large insurance industry prospered as never before. The fall of the Iron Curtain struck at the Connecticut defense industry for obvious reasons and with the collapse of the real estate market in southwest and elsewhere the insurance industry reeled from the loss of investments in usually safe land development projects. Clustered around these industry giants in Connecticut were tens of thousands of jobs in subcontracting and in the service sector.

In the space of four years two hundred thousand well paying manufacturing jobs left the state or simply disappeared. Tens of thousands more vanished because of the cluster effect. Connecticut lost much of its tax base and unemployment soared. There was no such decline in the Medicaid rolls or in the demand for more prison space.

Connecticut, like Massachusetts and other states in the northeast, has long been near the bottom of the list in support for higher education on a per capita basis; Connecticut ranks forty-eighth out of fifty in such a state comparison. Perhaps the ranking would be higher if the income were lower, after all, the state ranks first in per capita income. The contrast is not a happy one, but that is part of the historical legacy for a region that has a substantial number of private institutions which compete for state support through student loan and grant programs.

So the University had to compete for state support in an environment where the economic bottom was falling out, in a state with no income tax and a sense that the economy was disadvantaged by a high sales tax and a combination of high business taxes. Stability had to be found.

It was thought that the drain could be stopped with the controversial (and previously passed and repealed) income tax. Stability would also come through heavy borrowing from the employee pension fund, a wage freeze, some state employee layoffs, agency budget cuts, and attrition. In order to sell the income tax, the sales tax was cut from eight percent to six percent on a broader base; state spending was reduced from $8 billion to $6 billion. Costs for prisons and Medicaid mirrored the experience elsewhere; if they were not out of control they were not subject to control. Along with the budget reductions and the cut in the sales tax the state approved a constitutional spending cap. The cap has loopholes not yet defined, but it suffices to say that the cap further squeezed "discretionary" spending i.e. higher education.

THE UNIVERSITY

In the four year period from 1989 through 1993 the University received reduction after reduction in budgets recommended by the governors. In terms of authorized but unfilled positions and cuts in operating funds, the University was down $50 million in its current services budget.

The University responded to the deepening crisis by creating a committee to review the deteriorating situation and to make recommendations about how to deal with the situation. The committee started analyzing a budget problem of a few million dollars and in a quickly moving situation they wound up with a need to address a budget deficit of $17.5 -- $20 million. The committee was called the Program Review Committee, but in fact they became a budget committee. The work of this committee was followed by a committee of the University Senate called the Senate Review Panel. The Senate committee found the situation to be as bad or worse than the Program Review Committee (PRC) outlined: In the words of the Senate Committee (SRC), "The fiscal crisis is real and is approaching a condition of financial exigency." Clearly, these are words not to be ignored. The SRC went on to say that: "The University must approach this crisis as a single coordinated unit with the full participation of all parties."

The crisis was full blown. On the record were recommendations to eliminate the School of Allied Health, the School of Family Studies, to close the UConn campuses at Waterbury and Torrington, to eliminate the program in Higher Education Administration (some saw irony in this), and to remove the general fund support for the Labor Education Center (which would cripple or close the program).

THE AAUP ROLE

There has been an active chapter of the American Association of University Professors at the University of Connecticut for nearly sixty years. During most of that time it was, as it is today in many institutions without collective bargaining, active in matters concerning academic freedom and tenure. The chapter dealt with salary matters only on an informal basis until 1972 when all unionized state employees received raises and nonunion employees did not. The faculty organized under the collective bargaining statute and proceeded to assert a role in the budget process through negotiating such things as salary, merit pay, professional development funds, summer session compensation etc.

In Connecticut, collective bargaining contracts have to be approved by the Legislature. Of course, other UConn budget matters are a matter of legislative review and approval, as well. It logically followed that the UConn AAUP would engage in lobbying and political activity to fulfill the obligation to negotiate a contract and to secure legislative approval. This experience was to pay dividends when the crisis arrived. If the framework of decision-making at the University was not complicated enough, the AAUP was a party to another set of negotiations with all of the state employee unions; pension and health care are matters to be negotiated in a legally mandated coalition since all state employees are covered by the same health insurance and pension plans (non-classified higher education state employees are allowed to join TIAA/CREF as an alternate choice). Into the budget cauldron went coalition bargaining over such big ticket items as saving $600 million in pension and health care costs, as well as having the coalition agree to deferral of a pay raise for twenty five pay periods followed by another raise a year later. The timing differed according to various contracts, but for UConn faculty it meant forgoing a seven percent raise for less than a year and receiving another raise nearly a year later; like other employees of the state we were to receive the next raise (6 percent) in May of 1993. This is how the external situation dovetailed with the UConn negotiations for the contract period to begin in July of 1993:

1. The state had a spending cap;
2. There was no money budgeted for raises in the biennium which started July of 1993;
3. Unemployment was high and state revenues were down;
4. Faculty in other states were receiving furloughs, wage freezes, layoffs, and pay cuts;

5. The University budgeting had switched to a block grant formula, but it was still being cut;

6. The University had a projected structural operating deficit as described above;

7. The University was considering the program and staff reductions called for in the PRC report; and finally

8. Sides were being chosen in the campus turf war about what should be cut and what programs should go.

THE PUBLIC RELATIONS AND LOBBYING STRUGGLE

Even in the best of times contract negotiations are something of a battleground. There is the struggle over prerogatives, over money, over the familiar rituals that labor relations professionals point to as evidence as to why they are needed in the process. It is usually a study in gains and losses.

PUBLIC RELATIONS

While the AAUP at UConn has long been engaged in lobbying as a necessary activity to secure contract approval in the State House, public relations activity as a tool of reinforcement of the lobbying activity began in earnest four years ago. We represent a terrific faculty who do world class work and are by themselves a potent, but unrecognized economic force in the state. UConn students are good students, but they were being asked to pay a larger and larger share of the operating cost of the University.

As the economic crisis began to unfold we realized that somehow favorable public opinion must be created to put higher education in a position to compete for the scarce resources of the state. Several years earlier as Executive Director of the AAUP Chapter at the University of Rhode Island I worked with our leadership to engage in a similar, though more focused, effort to impact legislative opinion through the use of a series of creative radio advertisements about the University's (and hence the state is') not being able to compete for the best faculty due to a relative decline in the pay for faculty at the full professor rank. It was a very successful campaign when combined with lobbying and related activity. Reinforced by that experience and with enthusiastic UConn AAUP leadership, we embarked on a public relations effort to have an impact on the legislative process beyond what we saw as very limited political impact.

We were joined in our efforts by our local state representative who was also Co-Chair of the House Appropriations Subcommittee on Higher Education and (at the time) Executive Director of the Democratic Party in Connecticut. More important than his titles were his skills in bridging academic perspectives (his parents are faculty) and the rough and tumble of State House politics. Representative Jonathon Pelto is here with us today and you will hear his perspective on the effort.

The University is a place of mystery to many, including graduates. The financing of a university is from many sources, but none are without limit; faculty contributions to the frontiers of knowledge are hailed by the same broad population that thinks faculty work between three and nine hours a week; higher education is seen as a way into the job market rather than an element of the creation of wealth. With all these conflicting attitudes and areas of misunderstanding, public relations as a means of competing for state support is a "hard sell." The competition is more easily understood and generally more active or attractive politically.

Our first theme was a study in contrast. For the first time, Connecticut was spending more money on prisons than on all of higher education. For a number of years the cost per inmate had exceeded the cost per student, in 1990 the state was spending, in the aggregate, more on incarceration than on higher education.

We drove the point home by photographing a student studying in a jail cell; the print noted the spending difference ("three times more on every prisoner than...to educate a student at UConn). This flier contained more information on this theme and included a mailing response card, sent to us, for forwarding to legislators of the respondents. The mailing was sent to families of students and to bargaining unit members. This mailing was also done jointly with our colleagues The Connecticut State University AAUP (CSU-AAUP)and the Congress of Connecticut Community College (AAUP/SEIU/AFL-CIO).

The Student Government at UConn (USG) joined in the cost of mailing to their families in this effort. The other faculty organizations joined in the cost of the project on a per capita basis and the text of the flier was modified to mirror their circumstance ("spends more than five times on every prisoner...").

Coupled with the mailing was a radio ad with essentially the same message. The radio ad ran on morning and noon "drive time." When we heard that the Governor heard the ad on his way to work and called the President of UConn to complain about our taking issue with his budget, we thought we might be on the right track. We were. Money was added back in the first of several worsening years. We were noting success, but never reversed the trend; the crisis was only delayed as the economy deteriorated.

In the next few years we continued the effort with different themes. With the UConn budget calamity looming in the Spring of 1993 we knew that the best hope for serious budget consideration lay in appealing to the economic interests of the state, through the leverage of the faculty contract and in some reaction to the unprecedented attention to the prospect of the University closing schools and campuses. The faculty and administration of the schools each mounted a campaign seeking support from alumni and legislature. The AAUP provided the schools a grant to pursue their activity and we worked closely with their leadership in meetings with newspaper editorial boards in seeking support for the University budget.

TIES THAT BIND

As you can see, we were busy in the Spring of 1993. We were charged with negotiating a raise for a new contract for the period beginning in July of 1993 while serious proposals called for the closure of schools and campuses, while the state revenue picture remained uncertain but the cap on spending was certain, and a biennial budget with no money for raises about to be adopted.

We had to sell our strength to a state desperate for economic renewal. Our public relations theme centered on the fact that UConn faculty conduct $88 million in funded research. That much activity puts UConn faculty in the same league as the top one hundred corporations headquartered in Connecticut -- including GE -- which does not have a lot more than it's headquarters in Fairfield County. That pays for a lot of jobs and supports a lot of vendors. We had a radio ad which touted UConn faculty as an $88 million business that was not leaving Connecticut (in contrast with the much headlined corporations that seemed to be leaving the state). That idea rang a bell in Hartford.

We needed to do more. We needed to make an offer the state could not refuse, We needed an operation almost as complicated as the Allied operation described in A Bridge Too Far; only we needed to have everything work.

Having campaigned hard on the theme of the University's being an economic asset we had to show that the faculty and the University were partners of the state rather than wards of the state. We proposed that the faculty accept three percent instead of six percent in May of 1993 in return for receiving the three percent back in the base pay in August of 1994 and an additional three percent in January of 1995 and a wage reopener in July of 1995. We also needed agreement that there would be no layoffs or notice of layoffs for the two year period (our normal notice periods would remain in effect), and that there would be no involuntary furloughs. On a cash basis (because our actions determine salary policy for the administration and the Law School) the University would save in 1993-94 about $5 million.

This would bring two years of calm, but we still went further; there was little confidence on campus that the state would want to honor this agreement with the UConn deficit exceeding the value of the refashioning of the raise. We advised the legislative leadership that we could not recommend our own proposal to our membership, if the Legislature would not approve at least $8 million more than what the Governor recommended in the UConn base budget in each of the next two years. If it did not all work, nothing would work and we would be staring at the hard uncertainties bearing down on us.

Since the subject here is public relations and not negotiations, we can leave this with the news that the proposal worked. It was not an easy sell to a skeptical membership or to a state government that was reluctant to come up with more money for higher education or an administration in Hartford that did not want to see any increase in the base rates of pay in the biennium. It is fair to say that the atmosphere created as a result of our public relations activity made the political and lobby work possible. Combined with other activities we know from the Legislative Office of Fiscal Affairs that the Legislature has added $27,500,000 in the last four years to the UConn base budget over what was recommended by the Governor. The UConn AAUP has in the meantime spent less than $250,000 to help make the case for the $27.5 million.

After Dunkirk Churchill observed that an evacuation was not a victory. Similarly, UConn is not where it should be in terms of state support, but it is not in the state of exigency warned of by the University Senate.

Many people deserve credit for the campaign success and present UConn stability; our AAUP leadership, Representative Jonathon Pelto, our public relations professionals, and the official UConn leadership. If the trust and confidence were not mutual between the AAUP and President Hartley and Board Chair Lew Rome, we would have had an experience more familiar to you as followers of the higher education scene.

POSTSCRIPT

Our public relations activity continues in a rebuilding effort. It should be noted that the state of Connecticut has a steady stream of building and renovation projects at UConn, a sort of infrastructure renewal. The University has restructured the institutional development framework in the expectation of fund-raising and institutional support in keeping with what a state like Connecticut can do, rather than what it has historically done. The AAUP pursues public relations with a new theme; a model of the State of Connecticut with the letters "UCONN" across the northern tier; the slogan is "The New Connecticut is Taking Shape at UConn."

We know that is true thanks in some measure to the work we have done with others to enable the many achievements of the UConn community to develop.

VIII. RECENT COURT DECISIONS

A. Discussion of Supreme Court Decision in Harris v. Forklift Systems

B. Campus Bargaining and the Law: The Management Perspective

C. Campus Bargaining and the Law: The AAUP's Perspective

RECENT COURT DECISIONS

A. DISCUSSION OF SUPREME COURT DECISION IN *HARRIS v. FORKLIFT SYSTEMS*[1]

Gwendolyn Young Reams, Esq.
Associate General Counsel
Equal Employment Opportunity Commission

In 1980, the Equal Employment Opportunity Commission, EEOC, issued its Guidelines on Sexual Harassment in which it stated that harassment on the basis of sex violates Title VII.[2] The Commission's Guidelines defined two kinds of sexual harassment. The first is *quid pro quo* harassment which occurs when a supervisor retaliates against an employee who refuses to acquiesce to unwelcome sexual advances or requests. The employee's refusal usually correlates directly with negative consequences, such as a denial of promotion, salary increase, demotion or discharge. The second is hostile environment harassment in which unwelcome sexual conduct unreasonably interferes with an individual's job performance or creates an intimidating, hostile, or offensive working environment.

It is the hostile environment claim in which the courts have had the most trouble determining when sexual harassment is actionable under Title VII. *Harris v. Forklift Systems* involves the hostile environment claim of sexual harassment. However, it is not the first case in which the Supreme Court has attempted to provide guidance in this area.

In 1986, the Supreme Court issued its first decision in a sexual harassment case in *Meritor Savings Bank v. Vinson*,[3] in which it stated that hostile environment harassment, as well as quid pro quo harassment, is actionable under Title VII. The Court approved the EEOC Guidelines and held that a Title VII violation is established when unwelcome sexual conduct is sufficiently severe and pervasive to alter the conditions of the individual's employment and create a hostile work environment.

In *Harris v. Forklift Systems*, the Supreme Court was asked to consider whether a plaintiff who seeks relief under Title VII from hostile environment sexual harassment must prove that she suffered serious psychological injury from the harassment. A unanimous court held that if the workplace is permeated with behavior that is severe or pervasive enough to create a discriminatory hostile or abusive working environment, Title VII is violated, regardless of whether the plaintiff suffered psychological harm.

The plaintiff, Theresa Harris, sued her employer, defendant Forklift Systems, claiming that the sexually offensive comments and conduct of Charles Hardy, the Company's President and Harris' direct supervisor, fostered a sexually hostile work environment. After a one-day trial, a Magistrate Judge found that Hardy engaged in a continuing pattern of sexually derogatory conduct directed only at female employees and particularly at Harris. More specifically the court found that the defendant:[4]

- Asked plaintiff and other female employees to retrieve coins from his front pocket.
- Threw objects on the ground in front of plaintiff and the female employees and asked these women to pick the objects up and then made comments about their appearances.
- Commented using sexual innuendo about plaintiff and other female employees' attire.
- On a number of occasions remarked to plaintiff in the presence of other employees "you're a woman, what do you know," "you're a dumb ass of a woman," and "we need a man as the rental manager."
- Remarked in the presence of other employees, as well as a client, "let's go to the Holiday Inn to negotiate your raise."

The Judge also noted that when Harris met with Hardy to complain about his treatment and threatened to resign, Hardy apologized for making the comments, and promised to stop. Shortly afterward, Hardy suggested in the presence of other employees that plaintiff must have promised sexual favors to a customer to secure an account. Harris then tendered her resignation and filed suit.

The Judge concluded that Hardy was a vulgar man that demeaned his female employees, that his comments were painful to Harris and demeaned her in front of her co-workers. The court found that his conduct offended Harris and would offend the reasonable female employees in her position. The Judge characterized most of Hardy's conduct as inane and adolescent, however.

Relying on a previous decision of the Court of Appeals for the Sixth Circuit,[5] where the Harris case arose, the Judge held that "the test of actionable sexual harassment under the hostile environment theory is whether the harassment is conduct which would interfere with that hypothetical reasonable individual's work performance and affect seriously the psychological well-being of that reasonable person under like circumstances."[6] The Magistrate Judge concluded that

Hardy's offensive comments were not so severe as to be expected to seriously affect Harris' psychological well-being or interfere with the work performance of a reasonable woman manager. The district court, therefore, ruled in favor of Forklift and the Court of Appeals affirmed.

Before Harris was decided, three courts of appeals had decided that a plaintiff in a hostile work environment sexual harassment case had to prove that she suffered psychological harm or injury.[7] The court granted certiorari to resolve this conflict among the circuits.

In its unanimous opinion by Justice O'Connor, the Supreme Court began its analysis by focusing on the language of Title VII, which makes it unlawful to discriminate against an individual with respect to terms, conditions or privileges of employment because of such individual's race, color, religion, sex or national origin. According to the court, the "phrase 'terms, conditions and privileges of employment' evinces Congress' intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment."[8]

The Court reaffirmed the standard in Meritor Savings Bank v. Vinson, as the means to establish a claim of hostile environment sexual harassment actionable under Title VII. Thus, the Court held, "(w)hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult'... that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment'... Title VII is violated."[9]

The Court noted that an "objectively" hostile or abusive work environment is one that "a reasonable person would find hostile or abusive," and one that the victim "subjectively perceive(d) to be abusive." The Court rejected the Sixth Circuit's psychological harm requirement, noting that "Title VII comes into play before the harassing conduct leads to a nervous breakdown." The Court stated, "...certainly Title VII bars conduct that would seriously affect a reasonable person's psychological well-being, but the statute is not limited to such conduct." The Court acknowledged the lack of a "mathematically precise test" for accessing hostile environment claims and concluded that such determination can be made only "by looking at all the circumstances."[10]

The Court suggested several factors relevant to the determination of whether an environment is "hostile" or "abusive:" the frequency of discriminatory conduct; the severity of the conduct; whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and whether the conduct unreasonably interferes with an employees's work performance. The Court emphasized that, "while psychological harm, like any other relevant factor, may be taken into account, no single factor is required." Since the district court had applied the incorrect psychological injury standard in reaching its conclusion, the Supreme Court remanded the case for reconsideration by the lower court.[11]

Justice Scalia and Justice Ginsburg issued separate opinions concurring with the Court. Justice Scalia criticized the Court's standard for determining whether sexual harassment is sufficiently egregious to violate Title VII as unclear. However, Justice Scalia concluded that he knew of no alternative "more faithful to the inherently vague statutory language than the one the Court today adopts," and joined the opinion.[12]

In a separate concurrence, Justice Ginsburg favorably cited the Commission's brief and stated that in a hostile environment case the "adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance." To show such interference, Justice Ginsburg stated, all the plaintiff need establish is that the harassment "so altered working conditions as to "make it more difficult to do the job.'"[13]

The Harris opinion serves to clarify the elements necessary for proving a hostile environment in harassment cases based on sex, as well as race, religion, national origin or age. The decision is consistent with the Court's previous Vinson decision and the EEOC Guidelines. The Court essentially made five major rulings. First, it reaffirmed the middle path it adopted in Vinson as to what constitutes a hostile environment under Title VII. The Court struck a balance between making actionable any conduct that is merely offensive and requiring conduct to cause tangible psychological injury. The Court reiterated its conclusion in Vinson that a "mere utterance of an...epithet which engenders offensive feelings in an employee' does not sufficiently affect the conditions of employment to implicate Title VII."[14] Thus, to prove actionable sexual harassment, the plaintiff must show more than isolated incidents or casual comments.

Second, the Court held that an "objectively" hostile or abusive work environment is one that a reasonable person would find hostile or abusive. Prior to the Harris decision, the courts had differing views on the question from whose perspective the "hostility" of the environment should be evaluated. Several courts of appeals had determined that a reasonable woman standard should be applied.[15] In its Policy Guidance, the Commission had adopted a "reasonable person" standard, and emphasized that "the reasonable person standard should consider the victim's perspective and not stereotyped notions of acceptable behavior."[16] Although the Court in Harris did not define "reasonable person," we believe the decision is consistent with the view that the perspective of the victim should be considered.

The third ruling the Court made is that the victim must "subjectively" perceive the environment to be abusive for conduct to have actually altered the conditions of employment. The requirement that a victim must subjectively perceive an environment as hostile is consistent with the Court's analysis in Vinson that workplace sexual conduct is unlawful only when it is unwelcome. Thus, in Vinson the Court refused to consider the voluntary nature of the victim's participation, stating that the proper inquiry is whether the employee "by her conduct indicated that the alleged sexual advances were unwelcome."[17] Similarly, the Commission has stated "conduct must be unwelcome" in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive.[18] Thus, participation in the sexual conduct may indicate unwelcomeness, but only if the conduct is similar in kind and degree to that of the alleged harasser. Participation in sexual jokes at work does not mean a person welcomed sexual touching.

Fourth, the Court held that Title VII protects against conduct which creates a hostile work environment, even when it does not seriously affect the victim's psychological well-being. The Court explicitly rejected the notion that the victim must suffer psychological harm. The unreasonableness of this requirement was particularly striking in the Sixth Circuit where Harris arose. In deciding hostile environment cases based on race and/or national origin, the Sixth Circuit did not require a showing of psychological injury.[19] Thus, it is not surprising that by the time the Harris case was briefed before the Supreme Court even the defendant had conceded that such a showing is too stringent a standard for injury in a sexual harassment case. Such a showing, of course, is also contrary to the Commission's Guidelines and the Vinson decision.

The Court also made clear that the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees, because of race, gender, religion, or national origin, offends Title VII's broad rule of workplace equality, and no tangible injury need occur. Thus, the Court concluded it is not critical that an abusive environment produce tangible effects such as poor job performance or limitation on employee advancement.

Finally, the Court held that whether an environment is hostile must be determined by looking at all the circumstances. This "totality of the circumstances" approach has been adopted by the Commission since its 1980 Guidelines. The guidance the Court gave by setting forth some standard to consider should be helpful to lower courts, even though the Court made it clear that no single factor is required. The Commission's Guidelines state that one should "look at the record as a whole and the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred."[20] The Court clearly adopted this approach in its decision.

The Harris decision should make it easier for victims to prove sexual harassment in hostile environment cases. It provides guidance to lower courts on how to analyze sexual harassment cases in several important areas. However, there are two important issues the Courts are grappling with that are not implicated by the Harris decision. The first is in the area of employer liability, particularly in hostile environment cases. Courts have consistently recognized that an employee is strictly liable in quid pro quo cases. In hostile environment cases, the Supreme Court stated in Vinson that whether an employer should be liable for sexual harassment that creates a hostile work environment turns on common law principles of agency.

In Karibian v. Columbia University,[21] the Second Circuit Court of Appeals in New York recently visited the employer liability issue is a mixed quid pro quo and hostile environment case. The district court in this case granted the defendant, Columbia University, summary judgment on the plaintiff's Title VII sexual harassment claim. The district court found that Sharon Karibian's claim that she succumbed to her supervisor's sexual demands, because he threatened her with adverse employment, action did not constitute quid pro quo harassment, because such harassment requires a showing of actual as opposed to threatened, economic loss. Thus, according to the court, Columbia could not be held strictly liable for its supervisor's actions. The court also found that Columbia could not be held liable under a hostile environment theory of harassment, because once Columbia received independent notice of the supervisor's conduct (one and a half years after the alleged harassment started), it took prompt and effective remedial action.

The court of appeals ruled that nothing in the language of Title VII or in the EEOC Guidelines would support the district court's requirement that the plaintiff prove actual, rather than threatened, economic loss in order to prevail under a quid pro quo theory. Instead, the court concluded "...the relevant inquiry in a quid pro quo case is whether the supervisor has linked tangible job benefits to the acceptance or rejection of sexual advances." The court of appeals then found that the plaintiff could also proceed under a hostile work environment theory without the need to prove that the defendant had notice of the harassment, but failed to act. Relying on Vinson, the court determined that employer liability for its supervisor's creation of a hostile work environment turns on common law principles of agency. Accordingly, the court of appeals concluded that "an employer is liable, if the supervisor uses his actual or apparent authority to further the harassment, or if he was otherwise aided in accomplishing the harassment by the existence of the agency relationship."[22] Several other courts have held that an employer may insulate itself from liability by taking prompt and effective remedial action after being advised of the sexual harassment.

Another issue moving through the lower courts involves employees' First Amendment rights to free speech. The Supreme Court has made it clear that Title VII guarantees every employee the right to work in an environment free from harassment based on race, sex, national origin or religion. Some argue that to restrict an employee from hanging "girlie" pictures in his work area or making lewd comments or slurs that are not directed to any particular person may infringe on First Amendment rights. The Commission has made clear its view that the proliferation of pornography and demeaning comments, if sufficiently continuous and pervasive, can violate Title VII. Additionally, the conduct need not specifically be directed at the person who is affected by it.

ENDNOTES

1. Harris v. Forklift Systems, Inc., ___U.S.___, 114 S.Ct. 367 (1993).

2. Guidelines on Sexual Harassment ("Guidelines "), 29 C.F.R. § 1604.11 (a)

3. Meritor Savings Bank v. Vinson, 447 U.S. 57, 106 S.Ct. 2399 (1986).

4. Harris, 114 S.C. at 369 (References to unpublished district court decision).

5. Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir.1986).

6. Harris, 114 S. Ct. at 370.

7. Rabidue, supra; Vance v. Southern Bell Telephone & Telegraph, 863 F.2d 1503 (11th Cir. 1989): Downs v. FAA, 775 F.2d 288 Fed. Cir. 1985).

8. 114 S.Ct. at 370, quoting Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 98 S.Ct. 1370 (1978).

9. Id., citing Vinson, 477 U.S. at 65.

10. 114 S.Ct. at 371.

11. Id.

12. 114 S.Ct. at 372 (Scalia, J., Concurring).

13. Id. (Ginsburg, J., Concurring).

14. 114 S.Ct. at 370.

15. Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991); Andrews v. City of Philadelphia, 895 F.2d 1469 (3d Cir. 1990); Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988).

16. Policy Guidance on Current Issues of Sexual Harassment, 8 FEP Manual (BNA) 405:6681 (3/19/90), page 15.

17. Vinson, 477 U.S. at 68.

18. Policy Guidance at page 7, quoting Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982).

19. Davis v. Monsanto Chemical Co, 858 F.2d 345 (6th Cir. 1988); Erebia v. Chrysler Plastic Products Corp., 772 F.2d 1250 (6th Cir. 1985).

20. 29 C.F.R. § 1604.11 (b).

21. Karibian v. Columbia University, 14 F.2d 773, (2d Cir. 1994).

22. Id. at 789.

RECENT COURT DECISIONS

B. CAMPUS BARGAINING AND THE LAW: THE MANAGEMENT PERSPECTIVE

Nicholas DiGiovanni, Jr., Esq.
Susan L. Lipsitz
Morgan, Brown, Joy, Boston, MA

I. INTRODUCTION

A review of collective bargaining cases from 1993 to the present reveals decisions on a range of topics, including disclosure of employees' addresses, agency fee procedures, exhaustion requirements, standing and management rights. Looking beyond traditional labor issues, discrimination, First Amendment, and disability cases continue to attract the courts' attention. In one of its most noteworthy decisions of the 1992-93 term, *St. Mary's Honor Center v. Hicks*, the Supreme Court classified issues regarding burdens of proof in an employment discrimination case, but left other questions unanswered. The following survey of cases is arranged generally by court, beginning with Supreme Court decisions.

II. CASE LAW

A. SUPREME COURT

Burdens of Proof in Discrimination Cases: *St. Mary's Honor Center v. Hicks*

In June, 1993, the Supreme Court decided an important case regarding the parties' burdens of proof in discrimination cases brought pursuant to Title VII of the Civil Rights Act of 1964. In *St. Mary's Honor Center v. Hicks*,[1] the Court addressed the issue of whether, in a suit against an employer alleging intentional racial discrimination, the trier of fact's rejection of the employer's stated reasons for its actions compels a finding for the plaintiff. The five to four majority held that such a finding is not compelled.[2] The case has important ramifications, both in higher education and elsewhere.

In *McDonnell Douglas Corp. v. Green*,[3] the Supreme Court delineated the standards and order of proof in a discrimination case. The plaintiff has the initial burden of establishing the elements of a prima facie case. Having done so, the plaintiff creates a presumption of discrimination. The defendant must then articulate a legitimate, nondiscriminatory reason for the discharge. This burden is one of production only, and once the employer articulates such reasons, the presumption of discrimination drops from the case entirely. The burden of persuasion of proving intentional discrimination remains with the plaintiff at all times.[4]

In Texas Department of Community Affairs v. Burdine,[5] the Court suggested that a plaintiff can satisfy his or her overall burden of proof simply by a showing that the employer's articulated reasons for discharge are not worthy of credence. This is inconsistent with other statements in Burdine, however, that the employer need not demonstrate that it was in fact motivated by its stated reasons and that, once the employer has articulated legitimate business reasons for its actions, the presumption created by the plaintiff's prima facie case disappears.[6] In Hicks, the Court sought to resolve the doubts that lingered after Burdine as to the parties' respective burdens.

Melvin Hicks, a black man, worked for St. Mary's Honor Center (St. Mary's), a halfway house operated by the Missouri Department of Corrections and Human Resources (Department). Hicks was hired in 1978 as a correctional officer and promoted to shift commander in 1980. In 1984, after extensive personnel changes, Hicks answered to a new supervisor and superintendent. Thereafter, Hicks's previously satisfactory employment record became marred, when a series of disciplinary actions, including a demotion, were taken against him. Hicks was ultimately discharged in April, 1984 for threatening his supervisor during a verbal battle.[7]

Following a bench trial, the District Court found that the reasons stated by St. Mary's for Hicks's demotion and discharge were not the real reasons, but that there had been "a crusade to terminate" him. The District Court found, however, that Hicks had not shown that the crusade was "racially rather than personally motivated," and Hicks therefore failed to meet his ultimate burden of proving intentional discrimination. The Court of Appeals reversed, reasoning that once Hicks established pretext, he was entitled to judgment as a matter of law under Burdine.[8]

The Supreme Court reversed again stating that:

> [t]he fact-finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proferred reasons, will permit [but not compel] the trier of fact to infer the ultimate discrimination....[9]

Seeking to resolve the doubts created by Burdine, the Court characterized its statement to the contrary in that case as an inadvertent misstatement of dicta. The court rejected the notion that a verdict for the plaintiff is compelled in all cases where the employer's reasons for its actions are believed to be pretextual.[10] Hicks makes clear that proof of intentional discrimination is indispensable to the plaintiff's case.

While Hicks clarifies certain evidentiary issues for employers and employees, it does not resolve all of them. Confusion remains as to the minimum amount of evidence a plaintiff needs to prevail, and as to the specific impact circumstantial evidence has upon the plaintiff's case. Overall, a plaintiff can no longer guarantee himself victory simply by discrediting the employer's reasons for its actions. Nevertheless, the risks of advancing pretextual, albeit non-discriminatory reasons, in the first instance, is ultimately in the best position of course, should litigation arise.

Disclosure of Employees' Home Addresses: Defense Department v. FLRA

In February, 1994, the Supreme Court decided a case affecting federal civil service employees and their collective bargaining representatives.[11] In Defense Department v. Federal Labor Relations Authority, the Court held that disclosure of the home addresses of federal agency employees pursuant to requests made by their unions under the Federal Service Labor-Management Relations Statute (FSLMRA) would be an invasion of privacy within the meaning of the Freedom of Information Act (FOIA).[12]

When two local unions requested that several federal agencies provide them with the names and home addresses of the agencies' bargaining unit employees, the employers supplied names and work stations, but not home addresses. The unions then filed unfair labor practices charges with the FLRA pursuant to the FSLMRA, which the unions claimed compelled disclosure of the addresses. The agencies defended on the grounds that the Privacy Act of 1974 prohibited disclosure.[13]

Balancing the privacy interest of bargaining unit employees in non-disclosure of their home addresses with a "negligible" FOIA public interest in disclosure, the Court held that the Privacy Act prohibited the release of the addresses. In so holding, the Court recognized the disparity between federal and private sector unions on this issue. The NLRB has interpreted the NLRA to allow the disclosure of home address lists to private sector unions, but the Privacy Act does not apply to private sector unions. The Court was, therefore, not disturbed by the difference in treatment.[14]

Compulsory Arbitration of Job Bias Claims: Supreme Court's Refusal to Review

In 1991, in Gilmer v. Interstate/Johnson Lane Corp., the Supreme Court held that an arbitration provision of a securities registration application can render arbitration of a job bias claim compulsory.[15] On November 29, 1993, the Supreme Court declined to review a Second Circuit case and a New York case, both of which addressed the Gilmer issue but which reached seemingly contradictory results.[16] In Bates v.

Long Island Railroad Co., the Second Circuit held that exclusive dispute resolution procedures in the Railway Labor Act did not preempt disability discrimination claims brought by employees of the Long Island Railroad Company.[17] Conversely, in Fletcher v. Kidder, Peabody & Co., Inc., the New York Court of Appeals held that an employee in the securities industry was bound by an agreement, governed by the Federal Arbitration Act, to arbitrate his race discrimination claims.[18]

B. CIRCUIT COURTS OF APPEAL

Agency Fees: Grunwald v. San Bernardino City Unified School District

In May, 1993, the Ninth Circuit dismissed a constitutional challenge to an agency fee procedure that deducted, maintained in escrow, and then refunded fees from nonmember teachers for amounts not actually expended for the union's collective bargaining activities.[19] Despite its acknowledgement that "the First Amendment protects people from having to put their money where their mouth isn't," the court found that the union's collection and refund scheme: 1) did not require nonmembers to support speech with which they did not agree; 2) served a legitimate purpose; and 3) was administered in a fair and impartial manner.[20] In November, 1993, the Supreme Court rejected a petition for review filed by the National Right to Work Legal Defense Foundation.[21]

The Grunwald plaintiffs were nonunion teachers in the San Bernardino Unified School District (the District). Pursuant to an agency shop agreement between the District and the San Bernardino Teachers Association (the SBTA or Union), the SBTA was the teachers' exclusive bargaining agent. To pay for its collective bargaining activities, the SBTA deducted "agency fees" from the plaintiffs' paychecks at the end of each month, while the same amount was deducted from members' checks in the form of membership dues.[22] The SBTA's activities were not confined exclusively to bargaining, however, but included contributions to to political candidates. Pursuant to the Supreme Court's 1977 decision in Abood v. Detroit Board of Education.,[23] agency fees may not be required to support such nonrepresentational forms of speech, and the SBTA's collection and refund procedure thus triggered important First Amendment issues.

The actual collection and refund procedure in Grunwald was straightforward. The deducted agency fees were placed in an independently managed interest-bearing escrow account. On October 15 of each year, the SBTA informed nonmembers as to how to obtain a refund, based on its own calculations, of funds not used for collective bargaining activities. To receive a refund, nonmembers had to object to the SBTA's use of their fees by November 15. Nonmembers could then either accept the SBTA's calculation of the pro rata share and receive a rebate for the entire year by December 7, or they could dispute the SBTA's calculation, arbitrate the matter, and receive payment by approximately mid-February. The plaintiffs objected, claiming that even a temporary deduction from their paychecks in excess of the amount spent on representational activities violated their First Amendment right against compelled speech.[24]

Following a clear line of Supreme Court decisions, the Ninth Circuit recognized that the First Amendment prohibits compelled subsidies of ideological causes.[25] This prohibition notwithstanding, union security agreements providing adequate First Amendment protections are not unlawful.[26] Thus, the issue in Grunwald became whether any of the plaintiffs' money was in fact used for ideological purposes (the substantive First Amendment right), and, if not, whether the SBTA's procedure conformed to the plaintiffs' First Amendment right "to a fair, prompt and effective procedure, both for identifying what sums they are required to pay and, if more than that is collected, for obtaining a refund of the excess" (the procedural First Amendment right).[27]

Regarding the substantive First Amendment issue, the Ninth Circuit held that the First Amendment was not violated by the use of an escrow procedure, and the court joined the Second, Third, Fourth and Eleventh Circuits in holding that the escrow account procedure obviated that need for advance reductions of dues.[28] Because the escrow funds were at no time actually used for nonrepresentational activities, the SBTA procedure did not violate the plaintiffs' substantive First Amendment rights.[29]

The court held that the plaintiffs' procedural First Amendment rights were similarly protected. In Chicago Teachers Union v. Hudson,[30] the Supreme Court stated that a collection and refund procedure must "be carefully tailored to minimize the infringement upon nonmembers' First Amendment rights."[31] The Supreme Court struck down the escrow arrangement in Hudson because: 1) it did not provide an adequate explanation for an advance reduction of dues; and 2) there was no provision for a prompt decision from an independent decisionmaker.[32] The Ninth Circuit majority interpreted Hudson to require a union to either avoid an deduction-escrow-refund procedure altogether or to provide an "adequate explanation" for the failure to use the preferred "advance reduction" procedure.[33] An "adequate explanation" would show that it would be "far more costly or cumbersome" or even "impossible" to avoid the escrow procedure. Further, an escrow scheme must be: 1) reasonably prompt; 2) provide the employee with sufficient information from which to judge the adequacy of the refund; and 3) make provision for an impartial decisionmaker to calculate the refund should the nonmember so desire.[34]

The SBTA had provided an adequate explanation for its use of the escrow procedure. Public school teachers are employed on a school year by school year basis; all employees begin working at the same time each year; and the Union membership status of all teachers is unknown at the beginning of each school year. It would therefore have been "highly impractical" to gather the information needed to identify nonmembers and to collect for only bargaining activities prior to the first paycheck cycle. Further, the timetable used by the SBTA was "reasonably prompt" and the provisions for choosing an American Arbitration Association arbitrator satisfied the "impartial decisionmaker" requirement. Thus, despite the nonmembers' four-month loss of fees not used for representational purposes, the SBTA's procedure struck a proper balance between its own collection rights and the plaintiffs' First Amendment rights.[35]

In seeking Supreme Court review, the plaintiffs contended that the circuits are split as to advance information and notification requirements in agency fee procedures after Hudson. The Supreme Court's decision not to disturb the Ninth Circuit's holding leaves at least some differences in the level of constitutional scrutiny afforded agency fee collection procedures.

Defining Disabilities: Cook v. Department of Mental Health and Winston v. Maine Technical College System

Illustrating the difficulty of defining a "disability" within the meaning of anti-discrimination statutes, the First Circuit recently decided the "pathbreaking perceived disability case" of Cook v. Department of Mental Health.[36] The plaintiff in Cook had worked as a institutional attendant for the Rhode Island State Department of Mental Health, Retardation and Hospitals (MHRH) for a number of years prior to 1988, and her employment record during that time had been "spotless." However, when she reapplied for the identical position in 1988, she was 5'2" and 320 pounds. When the MHRH refused to hire her, she brought a claim under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. § 794 (Act), and state law. MHRH defended on the grounds that morbid obesity is not a handicap within the Act.[37]

In a failure-to-hire case under the Act, the plaintiff must prove that: 1) she applied for a position in a federally funded program; 2) she suffered from a cognizable disability; 3) she was nonetheless qualified for the position; and 4) the failure to hire was due solely to her disability.[38] The evidence in Cook revealed that the plaintiff was able to perform the duties required of an institutional attendant, and that the MHRH could not refuse her the job based on its "perception that [she] suffer[ed] from physical limitation[] that would keep her from qualifying for a broad spectrum of jobs...."[39] Further, the MHRH's actions did not fall outside the scope of the Section 504 where it perceived the plaintiff's condition as "mutable" or "voluntary" in that she could have lost weight.[40] The First Circuit stated in conclusion that "[i]n a society that all too often confuses 'slim' with 'beautiful' or 'good,' morbid obesity can present formidable barriers to employment. Where, as here, the barriers transgress federal law, those who erect and seek to preserve them must suffer the consequences."[41]

The Maine Supreme Judicial Court, interpreting the Act and a similar state statute, has held that a sexual behavior disorder is not a disability.[42] In Winston v. Maine Technical College System, the plaintiff was terminated when he violated the school's sexual harassment policy by kissing a student. The plaintiff claimed that he was unlawfully terminated because of his "mental handicap of sexual addiction."[43] An amendment to the Rehabilitation Act of 1973, effective October 29, 1992, excludes sexual behavior disorders, compulsive disorders and disorders from illegal substance abuse from its coverage, and the plaintiff's claim under the Act thus failed. The state statute on which the plaintiff also relied tracks the Act and the Americans With Disabilities Act, which specifically exempts "sexual behavior disorders" from the term "disability," and the plaintiff's state claim, therefore, also failed.[44]

Exhaustion of Remedies: Rogers v. Buena Vista Board of Education

In August, 1993, the Sixth Circuit heard the appeal of a teacher whose complaint had been dismissed by the District Court for failure to exhaust internal union remedies.[45] In Rogers v. Buena Vista Board of Education, a tenured black male teacher was laid off, but not recalled at the same time as certain others. Rogers filed a grievance alleging that the failure to recall was improper pursuant to his collective bargaining agreement, but the Buena Vista Education Association chose not to pursue the grievance. Rogers next filed a court complaint alleging two counts: 1) breach of the CBA and of the duty of fair representation; and 2) racial discrimination.[46]

The Supreme Court requires exhaustion, but may excuse that requirement in certain circumstances.[47] The plaintiff in Rogers was not excused from the exhaustion requirement on his first count, however. He could not show sufficient hostility, because the union's adverse position in court did not necessarily reveal what its position would have been had it been able to resolve the matter internally. Further, the union could have given the plaintiff the monetary relief he sought in court. Finally, the plaintiff's failure to inform himself of his remedies did not excuse his failure to exhaust them internally. Exhaustion was not required, however, for the racial discrimination claim, even where it was based upon the same underlying facts, because internal union remedies could not have cured discrimination by the school.[48]

Retaliation/Sexual Harassment: Purrington v. University of Utah

In Purrington v. University of Utah, the Tenth Circuit affirmed a District Court finding that a refusal to promote because of tensions caused by sexual harassment was not retaliation.[49] The plaintiff alleged sexual harassment against the director of the resource center where she worked. The plaintiff also alleged that she was not selected for a promotion, because she had created tension by discussing the harassment with numerous individuals within the university hierarchy.[50] The plaintiff brought hostile work environment and retaliation claims pursuant to Title VII of the Civil Rights Act of 1964. The hostile work environment claim was time barred. As for the retaliation claim, the plaintiff argued that because the school impermissibly based its decision on the tension surrounding her, the burden should have shifted to the school under *Price Waterhouse v. Hopkins* to prove that the successful applicant would have been chosen, even if the impermissible factor had not been considered.[51]

The Tenth Circuit held that the District Court's refusal to apply *Price Waterhouse* at all was erroneous, because this was clearly a mixed-motive case. There was, however, evidence that the tension surrounding the plaintiff was based upon factors other that her complaints about harassment. Thus, a finding that the protected activity was not a *substantial* motivating factor was not clearly erroneous, and the District Court correctly refused to shift the burden to the school. Since the school's decisions were based on legitimate considerations, the plaintiff's claim failed.[52]

C. FEDERAL DISTRICT COURTS

Standing to Challenge Arbitrator's Award: *Katir v. Columbia University*

In May, 1993, the United States District Court for the Southern District of New York held that a discharged university research assistant who was not a party to an arbitration between her union and the university, and who had not alleged that the union breached its duty of fair representation, did not have standing to vacate the resultant arbitration award.[53]

Campus Harassment Policies: *Dambrot v. Central Michigan University*

The proliferation of discrimination harassment policies on college campuses in recent years continues to prompt constitutional challenges as to the validity of the policies. In November, 1993, the United States District Court for the Eastern District of Michigan struck one school's policy in *Dambrot v. Central Michigan University*.[54] Nevertheless, a basketball coach who was fired pursuant to the policy was not entitled to reinstatement.

The coach held a locker room prep talk with his players, a majority of whom were black, in which he used the word "nigger." He was terminated pursuant to a regulation that prohibited intimidating, hostile, or offensive behavior toward individuals based on their racial or ethnic background. The court found the policy both over-inclusive (it embraced "all possible human conduct") and under-inclusive (it was limited to offenses against ethnic and racial groups only). The policy was also vague, both because it was unclear as to the specific conduct prohibited, and because it could be overzealously enforced.[55]

Despite the unconstitutionality of the policy, the coach was not entitled to reinstatement. In *Connick v. Myers*, the Supreme Court held that the public employee who challenges his employer's actions on First Amendment grounds must first show that the speech at issue was of public concern.[56] The

Dambrot court held that the locker room pep talk was held in a private setting for a small, specific audience and that no matter of public concern was raised until after the word was uttered.[57]

D. STATE COURTS

Management Rights: Local 639 v. District of Columbia and School District 88 v. Service Employees

The District of Columbia Court of Appeals recently addressed the issue of management rights in the public education context when it construed the Comprehensive Merit Personnel Act (CMPA), which governs labor relations between the government of the District of Columbia and its employees.[58] In Local 639 v. District of Columbia, the court reviewed three cases between the District public schools and two local unions. In the first case, the court held that where a school board puts a union on notice of its position that certain bargaining proposals infringe on management rights and are therefore non-negotiable, the union must file a negotiability appeal with the Public Employee Relations Board (PERB). The school board waives negotiability where it does not provide the union with sufficient notice.[59]

In the second case, the court held that working hours for attendance counselors and certain aspects of a drug testing program for those employees were not mandatory subjects of bargaining.[60] Finally, the court upheld in the third case the PERB's decision that: 1) proposals regarding the basic work week, the basic non-overtime work day, the working hours within each work day and the prohibition of split shifts were within management's prerogatives and therefore not mandatory subjects for bargaining; and 2) the school board was not required to negotiate with the union regarding a proposal that promotions up to regular wage grade be based strictly on seniority.[61]

Similarly, in School District 88 v. Service Employees, the Minnesota Supreme Court held that a school board was not required to negotiate over the decision to contract out a food-service operation where the contract was silent on the issue and it was therefore within management's prerogatives.[62] Nevertheless, the board had a duty to bargain over the effects of the decision, and its failure to do so entitled the discharged food-service employees to reinstatement and back pay.[63]

Revocation of Pay Raise by Legislature: Chiles v. United Faculty of Florida

In what is termed a "matter of great public importance," the Florida Supreme Court sharply rebuked the state legislature for its revocation of a pay raise the legislature had authorized to resolve an impasse in negotiations among various public employee unions and the state.[64] The legislature eliminated the pay raises due to a projected shortfall in public revenues. The court held, however, that:

1) the state legislature was bound to a contract negotiated by the state; and 2) the state constitution required both a compelling state interest and no reasonable alternative means of preserving the contract in order to allow the funds to be eliminated. The court thus ordered that the employees' pay and pay records be adjusted and that the pay raise be implemented retroactively.[65]

Supplementary Agreement: Tomlinson v. Bristol Board of Education

The Connecticut Supreme Court recently addressed several issues surrounding a supplementary agreement to a collective bargaining agreement between the Bristol Board of Education and the Bristol Federation of Teachers, AFL-CIO (Local 1464).[66] A tenured English teacher was terminated during a reduction in force. The court found that she had standing to enforce a supplementary agreement that established special teaching programs because she was an employee and therefore a "party" to the agreement within collective bargaining parlance. The plaintiff was not entitled to relief, however, because the school board did not breach the agreement when it retained teachers junior to her. Further, the union president had authority to execute the agreement in the first instance and it therefore could not be disavowed.[67]

Merger of Unions: Lake County Board v. SERB

The Ohio Court of Appeals has found no abuse of discretion in the trial court's determination that a State Employee Relations Board (SERB) directive was lawful. The SERB directed two unions to hold self-determination elections regarding their consolidation or merger.[68]

Refusal to Participate in Arbitration: Chester Upland Education Association v. PLRB

A Pennsylvania state court has held that an employer's refusal to participate in the grievance process is an unfair labor practice. In Chester Upland Education Association, the Commonwealth Court of Pennsylvania held that a school district would have been wiser to either submit to the arbitrator's jurisdiction and contest arbitrability of its decision to furlough or place teachers on part-time status, or to seek a stay of arbitration of that grievance.[69] Instead, by refusing to participate at all, the school district committed an unfair labor practice and was ordered to submit to arbitration.[70]

Benefits to Same-Sex Partners

An increasingly controversial issue in higher education surrounds the extension of benefits to same-sex domestic partners. In December, 1993, the University of Pennsylvania trustees voted to extend health, retirement and tuition benefits that had previously been available only to spouses and children of married employees to same-sex domestic

203

partners. The private employer of 20,000 employees joins just a handful of other schools, including the University of Chicago, Stanford University and the University of Iowa, in extending such benefits.[71]

Claims by individuals unable to obtain such benefits have begun to emerge. In a pre-1993 court case, the Gay Teachers Association stated a claim of sexual orientation and marital status discrimination against the Board of Education of the City of New York, where the Board provided health insurance benefits to spouses, but not to same-sex partners.[72] In Rovira v. AT&T, the United States District Court for the Southern District of New York granted summary judgement in favor of the employer on an ERISA claim for benefits by the same-sex partner, and her children, of an AT&T employee who died of cancer.[73] The employer's ERISA governing plan documents did not provide relief, but the court noted that: 1) the result might have been different if the claim had been based on contractual grounds and the employer's written policies did not contain disclaimers; and 2) if the plaintiffs were to prevail, "spouses" and children of heterosexual significant others might also be entitled to benefits, and the matter might therefore be better left to legislatures or collective bargaining negotiations to resolve.[74] Further, in June, 1993, the Vermont Labor Relations Board sustained the grievance of four University of Vermont gay and lesbian faculty members who claimed that the public employer discriminated against them on the basis of their sexual orientation and marital status by denying them benefits; the school's benefit plans had not expressly exempted from its policy against sexual orientation discrimination. The Board expressly withheld judgment on whether the employer should provide coverage for heterosexual employees.[75]

Thus, employers who neither extend benefits to same-sex partners nor expressly address the issue in their literature risk challenges in court or arbitration. Employers should also be prepared to address the related and emerging issue of whether partners of heterosexual employees should receive benefits.[76]

ENDNOTES

1. _U.S. _, 113 S. Ct. 2742, 125 L. Ed. 407 (1993).

2. _U.S._, 113 S. Ct. 2742, 125 L. Ed. at 414, 418-419.

3. 411 U.S. 792, 93 S. Ct. 1817 (1973).

4. *Hicks*, _ U.S._, 113 S. Ct. 2742, 125 L. Ed. at 415-16 (citations omitted).

5. 450 U.S. 248, 101 S. Ct. 1089 (1981).

6. *Hicks*, _ U.S. _,113 S. Ct. 2742, 125 L. Ed. at 421-24 (citations omitted).

7. *Id.*, 125 L. Ed. at 414-15.

8. *Id.*, 125 L. Ed. at 417 (citations omitted).

9. *Id.*, 125 L. Ed. at 418-19.

10. *Id.*, 125 L. Ed. at 418-19, 423 (citations omitted).

11. *Defense Department v. Federal Labor Rel. Auth.*, _ U.S._, 114 S. Ct. 1006, 145 L.R.R.M. (BNA) 2513 (1994).

12. 145 L.R.R.M. (BNA) at 2513.

13. 145 L.R.R.M. (BNA) at 2513-14; 5 U.S.C.A. * 552a.

14. *Id.* at 2515-19.

15. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S. Ct. 1647 (1991).

16. *Long Island Railroad Co. v. Bates*,_U.S._, 114 S. Ct. 550 (1993); *Fletcher v. Kidder, Peabody & Co.*,_U.S._, 114 S. Ct. 554 (1993).

17. 997 F.2d 623,619 N.E.2d 998, 601 N.Y.S.2d 686 (1993).

18. 81 N.Y.2d 623, 619 N.E.2d 998, 601 N.Y.S.2d 686 (1993).

19. *Grunwald v. San Bernardino City Unified School District*, 994 F.2d 1370 (9th Cir.), *cert. denied*, _ U.S. _, 114 S. Ct. 439 (1993).

20. *Grunwald*, 994 F.2d at 1373-75.

21. _ U.S. _, 114 S. Ct. 439 (1993).

22. 994 F.2d at 1372.

23. 431 U.S. 209, 234-37, 97 S. Ct. 1782 (1977).

24. 994 F.2d at 1372-73.

BEST COPY AVAILABLE

25. Id., citing Keller v. State Bar, 496 U.S. 1, 15, 110 S. Ct. 2228, 2236 (1989); Chicago Teachers Union v. Hudson, 475 U.S. 292, 301-304, 106 S. Ct. 1066, 1073-75 (1986); Abood, 431 U.S. at 234 n.31, 97 S. Ct. at 1799 n.31 (citation omitted). For a recent example listing nonrepresentational activities for which agency fees cannot be used, see Jibson v. Michigan Educ. Ass'n, 143 L.R.R.M. (BNA) 2473 (E.D. Mich. 1992) (union may not charge nonmember agency fee payers for the costs of a program designed to secure funds for public education in the state or for a portion of the union's publication that reports program activities and public relations expenses, such as informational picketing, media exposure, signs, posters and buttons; union's agency fee collection notice in compliance with, inter alia Hudson).

26. 994 F.2d at 1373 (citing Ellis v. Brotherhood of Railway Clerks, 466 U.S. 435, 444, 104 S. Ct. 1883, 1890 (1984).

27. 994 F.2d at 1373.

28. Id. at 1374 n.2. In Ellis, the Supreme Court stated that unions wishing to collect nonmember fees must utilize advance reduction of dues and/or interest-bearing escrow account procedures. 466 U.S. at 444, 104 S. Ct. at 1890. Note that the Sixth Circuit requires unions to reduce non-member fees in advance by "at least the amount unquestionably dedicated to ideological expenses." Grunwald, 994 F.2d at 1374 (citing Damiano v. Matish, 830 F.2d 1363, 1370 (6th Cir. 1987)).

29. 994 F.2d at 1374. The court rejected the plaintiffs' argument that their First Amendment rights were violated by their inability to use the deducted fees, even briefly, to promote their own causes. Id., n.4.

30. 475 U.S. 292, 106 S. Ct. 1066 (1986).

31. 994 F.2d at 1375 n.5 (citing Hudson, 475 U.S. at 303, 106 S. Ct. at 1074).

32. 475 U.S. at 309, 106 S. Ct. at 1077.

33. 994 F.2d at 1375. The dissent objected to the majority's application of Hudson to the Grunwald facts, contending that Hudson applied only to an advance reduction scheme, rather that to the type of escrow arrangement at issue. Id. at 1377-78.

34. Id. at 1375-76.

35. Id. at 1376. The dissent agreed that an escrow procedure adequately protects a nonmember's rights but contended that the SBTA had failed to adequately justify its failure to use the preferred "advance reduction" procedure and thus violated the plaintiffs' First Amendment rights. Id.at 1378-79.

36. 10 F.3d 17, 1993 U.S. App. LEXIS 30060, 63 Empl. Prac. Dec. (CCH) P42, 673 (1st Cir. 1993).

37. 1993 U.S. App. LEXIS 30060 at *1-2.

38. *Id.* at *4.

39. *Id.* at *20, *28-29.

40. *Id.* at *12-17.

41. *Id.* at *29.

42. *Winston v. Maine Technical College System*, 631 A.2d 70, 74-75 (1993), *petition for cert.filed* (Dec. 27, 1993).

43. 631 A.2d at 71-73. Note that the plaintiff's court claim was not preempted by an arbitrator's prior finding that the school did not violate the teacher's collective bargaining agreement when it discharged him. The defendants argued that, under *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S. Ct. 1647 (1991), an employee who agrees to arbitrate a statutory claim is subject to compulsory arbitration. *Winston* held, however, that an employee who merely joins a union without contracting to arbitrate statutory discrimination claims can assert those claims in litigation. *Id.*

44. *Id.* at 73-75. *See also* 29 U.S.C.A. * 706(8)(F); 42 U.S.C.A. * 12211(b)(1); 5 M.R.S.A. ** 4551-4632.

45. *Rogers v. Buena Vista Board of Education*, 2 F.3d 163, 143 L.R.R.M. (BNA) 3083 (6th Cir. 1993).

46. 2 F.3d at 165, 143 L.R.R.M. at 3083-84.

47. *Clayton v. International Union, UAW*, 451 U.S. 679, 692-96, 101 S. Ct. 2088 (1981).

48. 2 F.3d at 166-67, 143 L.R.R.M. at 3085-86.

49. 996 F.2d 1025, 1034 (10th Cir. 1993).

50. 996 F.2d at 1027, 1031.

51. *Id.*; *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775 (1989).

52. 996 F.2d at 1032-34.

53. *Katir v. Columbia University*, 821 F.Supp. 900, 900-901, 143 L.R.R.M. (BNA) 3053, 3053-56 (S.D.N.Y. 1993), *aff'd*, 15 F.3d 23, 145 L.R.R.M. (BNA) 2263 (1994).

54. *Dambrot v. Central Michigan University*, 839 F. Supp. 477, 1993 U.S. Dist. LEXIS 17294, *1, *44 (E.D. Mich. 1993).

55. 839 F. Supp. 477, 1993 U.S. Dist. LEXIS at *1-4, *9-23.

56. *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684 (1983).

57. 839 F. Supp.477, 1993 U.S. Dist. LEXIS at *24-43. *See also* *Fraser v. Pennsylvania Higher Education System*, 143 L.R.R.M. (BNA) 2272 (E.D. Pa. 1993) (laid-off professor of Afro-American Studies at state university filed unfair labor practice charge alleging violation of collective bargaining agreement by, *inter alia*, violation of his First Amendment rights following comments at faculty senate; no entitlement to preliminary injunction requiring reinstatement where testimony insufficient to establish constitutional claim).

58. *Local 639 v. District of Columbia*, 631 A.2d 1205, 144 L.R.R.M. (BNA) 2349 (D.C. 1993).

59. 631 A.2d 1205, 144 L.R.R.M. at 2355.

60. 631 A.2d 1205, 144 L.R.R.M. at 2357.

61. 631 A.2d 1205, 144 L.R.R.M. at 2358.

62. 503 N.W.2d 104, 143 L.R.R.M. (BNA) 2911, 2913 (Minn. Sup. Ct. 1993).

63. 503 N.W.2d 104, 143 L.R.R.M. at 2913-16.

64. *Chiles v. United Faculty of Florida*, 614 So. 2d 671, 143 L.R.R.M. (BNA) 2136 (Fla. Sup. Ct.), *clarified*, 615 So. 2d 671, 143 L.R.R.M. (BNA) 2806 (1993).

65. 615 So. 2d 671, 143 L.R.R.M. at 2138-39.

66. *Tomlinson v. Bristol Board of Education*, 629 A.2d 333, 145 L.R.R.M. (BNA) 2806 (1993).

67. 629 A.2d 333, 145 L.R.R.M. at 2087-98.

68. *Lake County Board v. SERB*, 620 N.E.2d 970, 145 L.R.R.M. (BNA) 2133, 2134 (Ohio Ct. App. 1993).

69. 631 A.2d 723, 726-27 (Pa. Cmwlth. 1993).

70. *Id.* at 724, 727.

71. 241 Daily Lab. Rep. (BNA) A-14 (12/17/93); 28 Daily Lab. Rep. (BNA) A-5 (2/12/93).

72. N.Y. Sup. Ct. (Aug. 16, 1991), *aff'd*, 183 A.D.2d 478, 585 N.Y.S.2d 1016 (1st Dep't 1992).

73. 817 F. Supp. 1062 (S.D.N.Y. 1993).

74. 817 F. Supp. at 1071 n.6, n.7.

75. *Grievance of B.M., S.S., C.M., J.R.*, Docket No. 92-32, Vermont Lab. Rel. Bd. 207, 213, 221 (June 4, 1993).

76. On a similar issue, see *Braatz v. Labor and Industry Review Commission*, 174 Wis.2d 286, 496 N.W.2d 597 (Wisc. Sup. Ct. 1993) (collective bargaining agreement health insurance non-duplication of benefits policy affecting

married employees and their employed spouses was held to violate the Wisconsin Fair Employment Act by discriminating on the basis of marital status).

RECENT COURT DECISIONS

C. CAMPUS BARGAINING AND THE LAW:
THE AAUP'S PERSPECTIVE

Ann H. Franke, Counsel
American Association of University Professors

This paper reviews three emerging areas of law which relate importantly to the rights of faculty members, faculty unions, and university administrations. According to my crystal ball these subjects, all concerning legislation, will help shape higher education law in the years immediately ahead.

SUPERVISORY STATUS OF PROFESSIONAL EMPLOYEES

With the Supreme Court's 1980 decision in *NLRB v. Yeshiva University,* 444 U.S. 672, faculty and administrations in collective bargaining in the private sector riveted their attention on the exclusion of managerial personnel under the National Labor Relations Act. Virtually every other feature of the statute receded in importance in the face of the dramatic defeat of the Yeshiva faculty's right to bargain. The practice of labor law in private colleges and universities, at least with respect to faculty rights, shrank to little other than parsing the managerial exclusion.[1]

Someday, perhaps soon, *Yeshiva* will no longer stand as an obstacle to faculty bargaining in the private sector, and we will awaken, like Rip Van Winkle, to a world in which some features of the labor law landscape may be unfamiliar. During our period of obsession with *Yeshiva*, the National Labor Relations Board and the courts have not stood still, but rather have forged ahead with construing the statute for other people in other employment settings. I would like to discuss one of these cases, which concerns statutory protection, not for faculty, but for nurses' aides. At issue is not the managerial exclusion implied in the National Labor Relations Act, but rather the *supervisory* exclusion which is expressly stated in the statute. This case also provided an opportunity for some brief comment on the respective roles of the NLRB and the courts in interpreting the Act.

The case is *National Labor Relations Board v. Health Care & Retirement Corporation of America* (No. 92-1964). The first thing to notice is that the party listed first, the NLRB, is the petitioner seeking review the Supreme Court, because it lost in the court of appeals. The NLRB was also the petitioner in Yeshiva.

The facts are fairly simple. The staff at the Heartland nursing home in Urbana, Ohio, had a series of complaints about their working conditions. When the administrator of the home refused to meet with them, several nurses drove to Toledo and spoke with representatives of the parent company. An investigation followed, some improvements were made, and then several of the nurses who had gone to Toledo were terminated or otherwise disciplined. In response to their NLRB charge, the employer asserted that these nurses, actually licensed practical nurses, were supervisors because of their authority over nurses aides. On every shift at the nursing home, both nurses and nurses' aides were on duty. Both groups had essentially the same duties in administering medicine to patients, checking on their status, speaking with physicians and families, and so forth. The aides also regularly bathed, dressed, and fed the patients. The nurses spent a small amount of time overseeing the work of the aides.

While the NLRB had, in its processing of the case, rejected the argument that the nurses were supervisors, the court of appeals in Cincinnati felt otherwise. The court declined to draw a distinction based on whether the nurses exercised their judgment only in the interest of patient care. Focusing instead on their actual responsibilities, Judge Celebrezee wrote:

> Among a staff nurses's functions are the authority to assign the nurses aides and to responsibly direct them. The Director of Nursing assigns each aide to a certain shift. Once assigned to a shift, the staff nurse in charge is responsible for assigning each aide to a particular patient. Each aide assignment is based primarily upon the needs of the patients, but also with an attempt to rotate the aides' assignments....it is clear that the duties of a staff nurse at Heartland nursing home clearly require both assigning aides to specific tasks and directing the operation of the aides.... 987 F.2d 1256, 142 LRRM 2728, 2731 (6th Cir. 1993).

Think about this in terms of the ancillary staff in just about any profession -- the draftspeople in architecture, physicians' assistants, paralegals, and, in our academic world, teaching assistants, lab technicians, and the host of other staff members who receive direction from faculty members. If the nurses aides at Heartland nursing home are supervisors, might faculty members also suffer the same fate? That is, once they are no longer deemed to be managers?

In their briefs to the Supreme Court, both parties to the case drew support for their arguments from Yeshiva. The nursing home argued that the Court in Yeshiva rejected the test of whether faculty members functioned "in the interest of the employer." This, according to Heartland, compelled rejection of the test looking to whether actions are "in the interest of the patient."

The NLRB, in contrast, stressed a footnote in Yeshiva approving of the Congressional approach in determining supervisory status, as expounded in the 1974 health-care amendments to the statute (444 U.S. 672, 690 n.30). Lawyers for the Board essentially argued that the nurses aides are almost like physical extensions of the nurses, assisting in the regular discharge of their professional responsibilities. One close court watcher had suggested that if these licensed practical nurses were found to be supervisors, professional employee bargaining is in big trouble.

The Supreme Court decided the case on May 23, 1994. The Court concluded that the nurses aides were indeed supervisors who could be terminated for protesting their working conditions. In a decision laced with references to Yeshiva, the Court rejected the contention that the nurses aides made only supervisory decisions about patient care, rather than decisions directed to the needs of the nursing home itself:

> As in Yeshiva, the Board had created a false dichotomy -- in this case, a dichotomy between acts taken in connection with patient care and acts taken in the interest of the employer. That dichotomy makes no sense. Patient care is the business of a nursing home, and it follows that attending to the needs of the nursing home patients, who are the employer's customers, is in the interest of the employer....We thus see no basis for the Board's blanket assertion that supervisory authority exercised in connection with patient care is somehow not in the interest of the employer 62 U.S.L.W. 4371, 4373 (May 24, 1994).

The case, like Yeshiva, was decided by a vote of five to four. Like Yeshiva, the four dissenting justices joined a strongly worded opinion. Written by Justice Ginsburg, the dissent stressed the distinction between "authority arising from professional knowledge, on one hand, and authority encompassing front-line management prerogatives, on the other.". The dissent reviewed earlier cases involving the supervisory status of doctors, faculty members, pharmacists, social workers, lawyers, and other professionals and implied that the Court has now entirely rewritten the law in this area (62 U.S.L.W. at 4376). The case does, indeed, have sweeping implications for professional employee bargaining.

On a more abstract level, the case invites a few final observations about the relationship between the NLRB and the courts. Here is the basic question. Congress goes to the trouble of setting up an expert agency and gives it the responsibility to interpret a complex statute. Over the span of many decades, the agency develops nuanced interpretations of that statute and becomes truly expert. Litigation before the NLRB, like that in the court system, is designed so that we generally have a winner and a loser. Losers in proceedings before the NLRB press their cases on appeal to the courts. What is left for the court to do, since the expert agency has already rendered an opinion? Is the court more or less expert? Like most things in law, there are two possibilities. One line of argument goes that the court is independent, even more independent than the politically appointed NLRB, and can undertake its own reading of the statute. Another approach says that, if the court cannot interpret the statute definitively, then the court should defer to the administrative agency. This philosophical conflict is among the dividing lines between the majority and the dissent in Health Care & Retirement Corporation.

PUBLIC DISCLOSURE OF CLASSROOM MATERIALS UNDER A STATE OPEN RECORDS ACT

Let me turn to a very different topic -- whether classroom materials used in public college are subject to a state open records law.[2] Virtually every state has a statute, like the federal Freedom of Information Act, which opens government records to public inspection. In New York the statute is known as the Freedom of Information Law (FOIL). A member of the public, Frank Russo, filed a request under FOIL to inspect material used at Nassau County Community College in a course in human sexuality. The college denied the request, stating that the material, a film on human intercourse, was not a "record" within the meaning of FOIL. Mr. Russo eventually filed a suit, and the case progressed through three levels of the New York court system.

The trial court ruled in Mr. Russo's favor and, in so doing, rejected concerns raised by the college about academic freedom. The court offered assurances that the public's "right to know" carried no corollary public right to determine the curriculum. The college appealed, and received support for its argument from its faculty union and AAUP, as friends of the court. The appeals panel ruled in favor of the college, on the limited theory that the materials were not agency records under FOIL. "No course material are secret, but are rather available to anyone who enrolls in the course. Against the backdrop of FOIL's purpose and the evils it was designed to address, we agree....that the materials at issue on this appeal do not come within FOIL's scope. To compel the College to produce them for inspection would not advance FOIL's laudable goals" (185 A.D.2d 982, 587 N.Y.S.2d 419).

The New York Court of Appeals finally resolved the case in October, 1993, deciding in favor of Mr. Russo. Five judges ruled unanimously that the film on intercourse is an agency record subject to disclosure. The court rejected, without discussion, concerns about academic freedom raised by the college and the friends of the court. Public colleges and universities in New York, including CUNY and SUNY systems, must not operate with a greater degree of public disclosure of their academic affairs. The precise contours of their obligations will be defined by future litigation. The issue, juxtaposing public accountability and academic autonomy, is likely to arise in other states as well.

A FEW THOUGHTS ON DISCRIMINATION

Let me conclude with a few comments on developments in higher education discrimination litigation. We are now, I believe, seeing some effects of the 1991 Civil Rights Act, which made jury trials available in Title VII cases. Two related effects are beginning to emerge. First, juries are generally considered to be more sympathetic to higher education plaintiffs than are judges and, second, many juries may award higher damages. Slowly, more cases are being resolved in favor of plaintiffs, and with larger monetary outcomes. A women's basketball coach at Howard University was awarded $1.1 million, a black professor denied tenure at Claremont Graduate School received $1.4 million, and Albert Einstein Medical College settled a sex discrimination case for $900,000.[3] Watch for further developments in this trend.

Even in an era with large damage awards, the cost of attorneys' fees during trial remains a major impediment for many plaintiffs. A recent creative, but ultimately unsuccessful, effort to recoup attorneys fees in a university discrimination action merits attention. Professor Theresa Duello challenged the nonrenewal of her contract by the University of Wisconsin Medical School through several avenues. These included discrimination charges filed with the EEOC and a state agency, as well as a complaint through the university's affirmative action office. She pursued a hearing before the Committee on Faculty Rights and Responsibilities, and the outcome was substantially in her favor. She then requested reimbursement of the attorneys fees she incurred for the intramural hearing. Attorneys fees under Title VII may be recovered for court proceedings, and she sought to broaden this entitlement to an intramural hearing in which she successfully challenged discrimination. While an intermediate appellate court in Wisconsin agreed with Professor Duello, the state supreme court did not. In its decision, issued in June, 1993, the court decided that the university process was an "optional" procedure, rather than a mandatory one under Title VII, and hence fees would not be awarded (501 N.W.2d 38 S.Ct. Wisc. 1993). Had the case been resolved the other way, the monetary stakes for administrations would have been raised substantially in intramural discrimination hearings. The issue highlights the link between intramural and court proceedings, which will assume new importance as institutions examine alternate dispute resolution mechanisms to truncate the processing of discrimination claims, which can be both lengthy and costly.

CONCLUSION

These several areas highlight the role of statutory regulation in the affairs of colleges and universities. Both Congress and state legislatures have major impact on higher education through legislation regulating labor law, open records, and equal employment opportunity. Colleges and universities are settings in which these issues may assume characteristics not found in other segments of society, necessitating further clarification through the courts.

ENDNOTES

1. Outside of the faculty context, the last twelve years have witnessed major developments in bargaining by support staff, notably at several Ivy League institutions. See generally, Richard W. Hurd, "The Unionization of Clerical Workers in Colleges and Universities: A Status Report," in J. Douglas, ed., Power Relationships on the Unionized Campus, Proceedings of the Seventeenth Annual Conference, National Center for the Study of Collective Bargaining in Higher Education and the Professions (1989).

2. See A. Franke, "Court Orders Disclosure of Course Materials on Sexuality," 80 Academe 60 (January-February 1994), which addresses the same subject and states, erroneously, that Mr. Russo had viewed the film and paid a fee. Arrangements for his viewing of the film were made in the summer of 1994, and the fee was to be waived.

3. "Howard Basketball Coach Wins $1.1-Million in Sex-Bias Lawsuit," Chronicle of Higher Education page A45, July 7, 1994; "Black Professor Denied Tenure Has $1.4 Million Award Upheld," Government Employee Relations Report p. 789, June 1, 1992 (case, however, brought under state, not federal, law); "Medical School, Researcher Settle Sex Bias Lawsuit," page G1, Washington Post, March 18, 1994.